S. HRG. 99-897

REMEDIES AGAINST DUMPING OF IMPORTS

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 1655

REMEDIES AGAINST DUMPING OF IMPORTS

JULY 18, 1986

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REMEDIES AGAINST DUMPING OF IMPORTS

FRIDAY, JULY 18, 1986

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL TRADE,
COMMITTEE ON FINANCE,
Washington, DC.

The committee was convened, pursuant to notice, at 9:30 a.m., in room SD-215, Dirksen Senate Office Building, Hon. John C. Danforth (chairman) presiding.

Present: Senators Danforth, Chafee, Heinz, and Pryor.

[The press release announcing the hearing, an opening statement of Senator Grassley, and a staff report on S. 1655 follow:]

[Press Release No. 86-054]

FINANCE COMMITTEE ANNOUNCES HEARING ON S. 1655

Senator Bob Packwood (R-Oregon), chairman of the Senate Committee on Finance, announced that the International Trade Subcommittee will hold a hearing on S. 1655, introduced by Senator Arlen Specter (R-Pennsylvania). The hearing will take place on Friday, July 18, 1986, beginning at 9:30 a.m. in room SD-215. Senator Danforth (R-Missouri), chairman of the subcommittee, will preside.

S. 1655 would make remedies of retroactive damages and equitable relief available in Federal court to private parties injured by import sales at less-than-fair value, as defined in the Tariff Act of 1930. S. 1655 would also create a private remedy for damages sustained as a result of customs fraud violations.

S. 1655 was favorably reported by the Judiciary Committee on March 20, 1986. In announcing the hearing, Senator Packwood expressed appreciation for the Judiciary Committee's agreement to referral of S. 1655 to the Finance Committee for its consideration.

Senator Packwood said that "Senator Specter's proposal raised issues of great importance in enforcement of our trade laws--notably whether and how to provide a private remedy against dumping of imports in this country. I hope this hearing will provide a full opportunity for consideration of Senator Specter's bill, along with similar proposals for retroactive relief, in the context of our overall trade policy." Senator Packwood noted the committee's particular interest in receiving the comment from U.S. industries that considers the adoption of such a proposal necessary to provide them adequate protection from unfairly traded imports, as well as from U.S. exporters that might be affected were similar rules adopted by our trading partners.

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STATEMENT OF SENATOR CHARLES E. GRASSLEY

JULY 18, 1986

MR. CHAIRMAN:

I APPRECIATE YOUR HOLDING THIS HEARING TODAY TO ADDRESS THE QUESTION OF HOW WE HANDLE DUMPED GOODS ON THE U.S. MARKET.

FOR SOME TIME, I HAVE BEEN CONCERNED ABOUT THE PROBLEM OF OUR FOREIGN TRADING PARTNERS DUMPING GOODS ONTO THE U.S. MARKET, EITHER FOR THE PURPOSE OF CAPTURING MARKET SHARE OR REDUCING OVER-PRODUCTION OF THEIR GOODS. FOR EITHER PURPOSE, IT HAS BEEN TO THE DETRIMENT OF OUR DOMESTIC PRODUCERS.

WHILE I WOULD AGREE THAT OUR DUMPING LAWS MAY BE WORKING AS INTENDED UNDER CURRENT LAW, I WOULD ARGUE THAT THE SOLUTIONS ARE NOT ADEQUATELY ADDRESSING THE LARGER PROBLEM AS I SEE IT, NAMELY, IN THE FOLLOWING INSTANCES:

1. WHEN AN INDUSTRY HAS BEEN HARMED BY DUMPED GOODS AND AN AFFIRMATIVE FINDING HAS BEEN MADE, BUT THE DUMPING MARGIN ASSESSED, FOR THE MOST PART, IS ONLY APPLIED PROSPECTIVELY.

2. WHEN THE DUTY IS ASSESSED THE EXPORTER NEED ONLY RAISE THE PRICE TO "FAIR VALUE" AND ANY DUTY COLLECTED ON THAT ENTRY IS EVENTUALLY REFUNDED.

I AM CONCERNED THAT THIS IS A CHEAP PRICE FOR THE EXPORTER TO PAY TO CAPTURE MARKET SHARE. WHILE THE PETITIONER MAY HAVE WON THE INITIAL PETITION FOR RELIEF, HE MAY HAVE LOST SUCH A LARGE SHARE OF THE AMERICAN MARKET HIS BUSINESS IS NO LONGER AS PROFITABLE AS IT WAS, OR EVEN WORSE, HAS BEEN DAMAGED TO AN EXTENT THAT HE NO LONGER CAN AFFORD TO STAY IN BUSINESS.

IT IS FOR THIS REASON THAT I AM CONTEMPLATING OFFERING LEGISLATION THAT, WHILE NOT GOING AS FAR AS SENATOR SPECTOR'S, WOULD INCORPORATE SOME OF HIS ORIGINAL THOUGHT ON THIS ISSUE. IN FACT, I COMMEND HIM FOR BEING TENACIOUS OVER THE LAST FEW YEARS ON THIS ISSUE, AND MAKING US MORE SENSITIVE.

MR. CHAIRMAN, I LOOK FORWARD TO HEARING MY COLLEAGUES TESTIMONY, AND AGAIN COMMEND YOU FOR HOLDING THIS VERY TIMELY HEARING.

BOB PACKWOOD OREGON CHAIRMAN
BOB DOLE KANSAS
WILLIAM V ROTH JR DELAWARE
JOHN C DANFORTH MISSOURI
JOHN H CHAFEE RHODE ISLAND
JOHN HEINZ PENNSYLVANIA
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WILLIAM DIEFENDERFER CHIEF OF STAFF
WILLIAM J WILKINS MINORITY CHIEF COUNSEL

United States Senate

COMMITTEE ON FINANCE
WASHINGTON, DC 20510

July 17, 1986

MEMO

FROM: FINANCE COMMITTEE TRADE STAFF (Joshua Bolten, 4-5472)

TO: FINANCE COMMITTEE MEMBERS

SUBJECT: TRADE SUBCOMMITTEE HEARING ON S. 1655

On Friday, July 18, beginning at 9:30 a.m. in Room SD-215, the International Trade Subcommittee will hold a hearing on S. 1655, introduced by Senator Specter. A current witness list is attached.

S. 1655 would provide private damage remedies in federal court for dumping and for customs fraud. Senator Specter has introduced similar but not identical (dumping) measures in previous Congresses; the proposals were defeated twice as floor amendments. This year, S. 1655 was reported favorably by the Judiciary Committee in March. The bill has been sequentially referred to Finance until August 1, 1986, at which time the Committee will be discharged.

Proposals similar to S. 1655's provision on dumping have been included in the House-passed omnibus trade bill (H.R. 4800, Section 158) and introduced in the Senate (S. 2408 - Cranston, Baucus).

I. THE PROBLEM

A. Dumping Duties are Prospective

Title VII of the 1930 Tariff Act, as amended, provides an administrative remedy against "dumping" of imports in the U.S. at "less-than-fair value" (LTFV). These provisions are authorized by GATT Article VI and its related Anti-Dumping Code, under which several other developed contries (notably those of the European Community, Canada, and Australia) also provide dumping remedies.

Under title VII, a petitioning domestic industry may obtain import relief if it demonstrates:

(1) to the International Trade Commission (ITC) that it is materially injured by imports; and

(2) to the Department of Commerce (DOC) that the goods are being sold in the U.S. at less-than-fair value.

In determining fair value, DOC normally investigates, for the six-month period preceding initiation of the case, the prices of accused foreign producers. An import will be deemed "dumped" in the U.S. if its U.S. price is lower than:

(1) The home-market price for the same product (or a third country if there is no home market); or

(2) A constructed value of the product (based on its cost of production plus allocated overhead and fair profit).

Thus, for example, if a Korean toy producer sells its product in Korea for $10, but in the U.S. for $8, it will be found dumping by $2. Or, alternatively, the Korean may be found dumping even if the price in both markets is $8, if the cost of producing that toy was $10. The remedy for this dumping would be imposition of a duty equal to the margin of dumping ($2, or 25% of the U.S. entered price).

The remedy, however, is applied prospectively only. Dumping duties are imposed only after DOC's preliminary dumping determination, which by statutory deadline normally comes 160 days after filing of the petition. (In unusual circumstances, the duties may be imposed retroactively to 90 days before the preliminary determination.) Moreover, only estimated duties are collected; the exporter need only raise its price to "fair" value, and any duty collected on that entry is eventually refunded. In the above example, importers of the Korean toy will henceforth be required to deposit 25% of the value of the imports; but on verification that the U.S. price has been raised to the home market price, the deposit will be refunded.

Any duties actually collected by Customs are deposited in the Treasury. Nothing goes to the petitioning industry, whose sole

benefit in the case is derived from raising imports' prices to "fair" value.

Proponents of additional remedies for dumping argue that the existing administrative remedy:

(1) is an insufficient deterrent to dumping; and

(2) fails to provide a remedy at all in certain situations, including:

(a) fast-turnover products, particularly in the high-tech area, where by the time a dumping case can be brought and won, the market has moved on to the next-generation product; and

(b) hit-and-run dumping: involving a large, one-time unloading of dumped product.

B. The 1916 Act Requires Predatory Intent

The 1916 Antidumping Act, 15 U.S.C. S 72, provides an antitrust remedy for acts similar but not identical to "dumping" under Title VII. The 1916 Act makes it unlawful to import any article at a price "substantially less" than its "actual market value or wholesale price" -- if done with the intent of injuring a U.S. industry or restraining trade. In addition to criminal

penalties, any person injured by a violation can sue in federal court and recover treble damages.

The 1916 Act has rarely been invoked and is widely considered practically useless, primarily because of the difficulty of proving the importer's predatory intent.

II. S. 1655

A. Described

S. 1655 would amend the 1916 Act to provide a remedy in federal court for:

1. "dumping" as defined in Title VII (i.e., sales in the U.S., below home market price or constructed value, that injure a U.S. industry), without having to prove any predatory intent on the part of the dumper.

Any person injured by dumping may sue:

1. the manufacturer of the imported product;

2. the exporter; and/or

3. the importer, if related to the manufacturer or exporter.

If the plaintiff proves the dumping, S. 1655 directs the court to award:

1. "equitable relief" -- presumably an injunction against further importation; or

2. if an injunction cannot be timely given or is otherwise inadequate, damages for injuries sustained.

Thus, returning to the example above, the court would receive evidence on whether the Korean toys were dumped and on whether the domestic industry was injured, applying the same standards as do the ITC and DOC under Title VII. Assuming the court found dumping, it would then ban importation of the Korean products. Or, if such an injunction were inappropriate, the court would require the dumper to compensate the plantiff for any damage it suffered from the dumping. For example, the plaintiff might be able to show that as a result of the $2 underselling by the Koreans, it lost $100,000 in sales, on which it would have earned $30,000. The court would order the Korean producer (or its exporter or related importer) to pay plaintiff $30,000.

S. 1655 would not preclude the filing of an administrative case under Title VII in addition to this action in federal court. In addition, S. 1655 includes language applying its provisions to subsidized as well as dumped goods.

B. Arguments Pro

1. Whereas under current law dumping is essentially penalty-free (up through several months after the filing of a case), S. 1655 would provide a strong deterrent to dumping.

2. S. 1655 would provide relief in a number of situations in which prospective relief is too late.

3. S. 1655 would provide genuine compensatin to the victims of dumping.

4. Dumping, as defined in Title VII, has been outlawed by the international community. There is no good reason to deny a private party injured by the wrong the opportunity, through court action, to prevent further harm or to obtain compensation for the injury.

C. Arguments Con

Opponents of the bill -- including the Administration, which is strongly opposed -- counter that:

1. S. 1655's remedy is disproportionate to the wrong. Much dumping, as defined in Title VII, is inadvertant and/or merely meeting price competition in the U.S. market.

2. The large potential retroactive liability -- for manufacturers, exporters, and U.S. importers -- would chill much legitimate trade.

3. Many U.S. firms are subject to dumping orders abroad and would be affected by any "mirror" legislation adopted by our trading partners.

4. Existing law provides a relatively fast and effective remedy, adjudicated by expert bodies with large staffs. Courts are poorly equipped to handle the kind of investigations and complex price adjustments conducted by the ITC and DOC; federal court litigation would inevitably be more time-consuming and costly.

5. S. 1655 is inconsistent with the GATT, which, in authorizing the imposition of prospective dumping duties, sets out the exclusive permissible remedy for dumping. Article 16(1) of the Antidumping Code provides: "No specific action against dumping . . . can be taken except in accordance with the provisions of the GATT." Proponents of S. 1655 counter that the GATT circumscribes only the governmental remedy; they argue that a private damages remedy is outside the scope of the GATT, at least as long as it does not establish standards of pricing or injury that differ significantly from those of the GATT.

III. OTHER PROPOSALS

A. House Bill

Section 158 of the House omnibus trade bill, H.R. 4800, would add to Title VI a similar private remedy for dumping. Like S. 1655, it would allow a private party injured by dumping to bring an action in federal court to recover damages. The major differences:

1. It could be used only where the DOC/ITC had already issued a final dumping order under Title VII.

2. Action could be brought against the manufacturer; or any importer or exporter "who knew or had reason to know" that the import was dumped. The legislative history suggests that a strong presumption of knowledge should exist where the importer or exporter is affiliated with the manufacturer. By contrast, S. 1655 would impose liability on any exporter, but on importers only when they are related to the manufacturer or exporter.

3. There would be no preference for injunctive relief (banning of imports); damanages would be the normal remedy.

The pro's and con's are similar to those for S. 1655.

B. S. 2408 (Baucus, Cranston)

S. 2408 also creates a private damages remedy in federal court for dumping. Like the House bill, it would reqire first a final antidumping determination by ITC/DOC. From there, S. 2408 establishes a rather complex procedure:

1. At the end of the ITC/DOC case, the petitioner would elect to simply allow imposition of antidumping duties as under current law; or to pursue compensation under this provision.

2. If the latter course is chosen, any dumping duties collected would be deposited in a separate fund in the Treasury, to help satisfy any subsequent court award against the defendant.

3. During the course of DOC's annual review of dumping orders, other petitioners would be given an opportunity to join in, and original petitioners would seek additional damages incurred since the original award.

Some major features of S. 2408:

1. The court would not re-try the issues, already decided by the ITC/DOC, of whether injurious dumping had occurred; petitioner would only need to prove its damages.

(Opponents of this approach argue that for reasons of due process and proof of damages, the court would almost certainly have to find dumping independently.)

2. S. 2408 would allow the court to award the injured producer not only actual damages, but also up to treble damages in cases involving repeat offenders or serious harm to U.S. industries, such as driving firms out of business.

3. Only foreign manufacturers, or entities controlled by them, could be sued.

4. The provision would no longer be enforceable if found by a GATT panel to be inconsistent with the GATT.

Again, the pro's and con's are similar to those raised regarding S. 1655.

C. Multiple Offenders

S. 2408 also would create a penalty for multiple offenses by a dumper. The second time within a ten-year period that an entity is judged to be dumping within a broad product area, DOC is directed to see that entity in federal court for a civil penalty. (Note that a repeat offense of dumping on the same product is not generally possible, since once a dumping order is

in place, the product is typically subject to monitoring and imposition of duties for many years under the existing order.) The penalty is equal to half the fair market value of dumped goods during the preceding year. For the third and any subsequent offense, the penalty would be 100 percent of the value of the imports.

IV. PRIVATE REMEDY FOR CUSTOMS FRAUD

Section 592 of the 1930 Tariff Act prohibits fraud in the importation of goods into the U.S. Enforcement rests with the Customs Service, which may seek civil or criminal penalties in federal court. Typical examples of customs fraud include mislabeling or misdescription of imports to evade a duty or a quota.

S. 1655 would create a private remedy for such customs fraud violations. It would permit the U.S. producer or wholesaler of a competing product, injured by the customs fraud, to bring an action for:

1. equitable relief (presumably an injunction against further imports); or

2. if injunctive relief is inadequate, compensation for the injury.

The plaintiff may recover for a fraudulent, a grossly negligent, or a merely negligent customs violation.

Proponents of the proposal argue that it would enhance enforcement of the customs fraud statute and provide compensation, not now available, to those injured by its violation.

Opponents of the proposal argue that S. 1655 seeks to provide a remedy for injury caused the U.S., rather than a private industry. They note that many customs violations, particularly negligent ones, are both common and not particularly serious. To impose potentially large liability on such actions would disrupt and chill legitimate trade. Moreover, the proposal is likely to make settlements in customs fraud cases difficult, since acknowledging a violation might lead to a private court action. The Administration, which strongly opposes the proposal, also argues that it would disrupt government enforcement of the statute.

(TED-0401)

Senator DANFORTH. Senator Specter has long advocated a judicial remedy for dumping cases, and he has, I think at least twice, offered amendments on the floor of the Senate relating to this concept. He has also introduced a bill and has asked for a hearing in the Finance Committee on his bill. This is the hearing; and Senator, we are delighted to see you in this forum.

Senator Heinz, do you have a comment?

Senator HEINZ. Mr. Chairman, thank you. I do. First, I want to commend my colleague, Arlen Specter, who has been working on the issue of how to get swift relief for an industry that is being beleaguered by unfair foreign competition. I think all of us were reminded only yesterday by the failure of one of our largest companies, the LTV Corp.—which is the Nation's second largest steelmaker, of just how critical timely action is. If Senator Specter's legislation had been law 2 years ago when the President made a commitment to impose voluntary restraints on foreign imports, it is my view that the steel industry would not have found itself in the difficult straits that it is in today. Although the President's program has slowly ratcheted down imports to very close to his stated goal as of last month, it has taken in excess of 2 years to reach that point.

I would also add that this morning I met with Bruce Smart, the Under Secretary of Commerce for Trade Administration, to urge the administration to address a very serious problem with the administration's voluntary restraint program, which is this: Although the voluntary restraints are on the threshold of actually meeting the President's stated objective of—if you include semifinished—20.2 percent of the market—they are at about 20.5—a very serious problem exists because in each of the VRA's, the administration ceded or conceded their right to initiate antidumping and countervailing duty cases.

As a result, as the steel market domestically has been shrinking as imports as a percentage of the market have been coming down, prices have plummetted and have remained quite low, depending on the market sector you are talking about, because, notwithstanding the fall of the dollar, other countries have been subsidizing or swallowing the cost. As a result, for example, Japanese steel is coming into the United States, notwithstanding the 40 percent appreciation of the yen, at the same price or less as a year ago.

Brazil is shipping steel in at lower and lower prices, and we are powerless under these VRA's to do anything about it because nobody, neither the industry nor the administration, under the terms of those VRA's can initiate antidumping or countervailing duty suits. What I have urged the administration to do is to replace its VRA's with orderly marketing agreements that do not contain the restrictions on antidumping or countervailing duty rights of action and to initiate immediately antidumping and countervailing duty suits where appropriate. This could be done under the national security section of our trade law that gives the administration the necessary authority. Further, it is this Senator's belief that the bankruptcy of LTV will force other similarly situated steel companies to follow its lead into bankruptcy because of the reduced load to LTV by virtue of removing many of its contracts and creditor arrangements. I cannot see how other steel companies can, in large

number, fail to follow them into chapter 11 for the very same cost reduction creditor-sheltering reasons.

If that happens, we would be on the verge of the wholesale destruction of our steel industry. Therefore, I think the President is fully justified in using his national security authority to take action.

Senator Specter, this was not exactly the opening statement either you or I anticipated for this hearing, but it comes back to your legislation because your legislation, had it been on the books, would have, I think, prevented the impasse and sad situation at which we appear to have arrived. So, I welcome you and I thank you for being here, and I commend you on your aggressive championing of this legislation.

Senator DANFORTH. Senator Specter. Thank you.

STATEMENT OF HON. ARLEN SPECTER, U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman, Senator Danforth, and Senator Heinz. I am pleased to be here before the Finance Committee to present my views on Senate bill 1655. This is legislation which would grant jurisdiction in the Federal courts to issue injunctive relief and award damages where there are existing violations of U.S. trade laws. This bill has been passed by the Judiciary Committee unanimously and is on referral to the Finance Committee given its obvious interest in trade matters.

This legislation now has the support of 14 U.S. Senators, including Senator Dole, the majority leader; Senator Byrd, the Democratic leader; and Senator Thurmond, the chairman of the Judiciary Committee. This legislation has been the subject of intense effort on my part for the past 5 years. Legislation of a similar nature was introduced in the 97th Congress and again in the 98th Congress, and Senate bill 1655 is currently pending in the 99th Congress. I have a commitment from Senator Dole, the majority leader, to bring the bill to the floor promptly upon the discharge by this committee on August 1.

Mr. Chairman and members of the committee, I would suggest that this is a long overneeded and a very fundamentally fair bill. What it does, in essence, is grant to private parties the opportunity to enforce existing law. It really seeks only to provide a remedy for existing prohibitions in the law. It is currently illegal to send goods into this country which are subsidized or dumped. There are many practices which are forbidden, for example, under the Multifiber Agreement; and these laws are violated with impunity repeatedly and at enormous cost to this country and the industries and workers in this country.

As a Senator from Pennsylvania, steel and textile imports have been catastrophic. Senator Heinz puts his finger on it when he notes this morning's headline on the front page of the Washington Post about LTV in bankruptcy—the biggest company in the history of the country to be in bankruptcy—$4 billion, and decimated by the steel imports, as the headline recites. There are many more industries in my State and many more industries in this Nation, including coal and cement and electronics, shoes and textiles and

garments, all unfairly dealt with. This bill, S. 1655, would give to the Federal courts the authority to enforce the law; and that really isn't very much to ask.

I had occasion to discuss this bill personally with President Reagan on July 31 of last year and received a favorable response—not a commitment, but a favorable response. There is a reluctance on the part of some office holders in the administration—Cabinet officers—to see such legislation enacted because it takes away some Executive authority; but that, Mr. Chairman and members of the committee, is precisely the problem. The executive branch has been trading off industries and jobs in the name of foreign policy. If it is in our national interest to make certain concessions to Great Britain, let's pay for it out of the National Treasury instead of allowing British steel to come to the United States and be subsidized to the tune of $250 a ton. If it is in the interest of our foreign policy to permit Colombian coal to come to the United States, then let's pay for it out of the National Treasury.

These questions are very hard to answer for Pennsylvania steel workers, as Senator Heinz well knows because he gets them with the same frequency, repitity, and intensity that I do. I put a simple question to Secretary of the Treasury Regan 2 years ago when the Treasury Department was before the Appropriations Committee asking for $8.4 billion for the International Monetary Fund. And the question tells the whole story: Why should a Pennsylvania steel worker pay taxes to the Federal Government, which then advances funds to the International Monetary Fund, which then loans money to Brazil, which subsidizes its steel industry, which steel then is imported into the United States and puts the Pennsylvania steelworker out of his job. He is no longer a taxpayer. He can't pay taxes any more, because he's unemployed.

And Secretary Regan's response was that it would be cataclysmic to Brazil. Well my response to that was obvious. I am worried about the cataclysm to workers in Pennsylvania and to the rest of the United States.

Mr. Chairman and members of the committee, I believe the judicial remedy is preeminently effective and preeminently feasible. As a practicing attorney, I have had considerable experience in the Federal courts, dealing with temporary restraining orders, dealing with preliminary injunctions. They are not easy, but they are doable; and they are doable with reasonable promptness.

The case of *Marathon* v. *Mobil Oil* took 6 weeks to litigate in the U.S. District Court in Cleveland—a Federal court in Cleveland—complex questions of law and fact. When the steel companies or others have gone to the International Trade Commission, they have taken in voluminous materials. I remember the Trigger-Price mechanism case in 1979. United States Steel brought wheelbarrels full of materials. And by the time these cases are taken there, the lawyers have worked them out and there is substantial evidence—sufficient evidence—to show irreparable harm and to get the kind of injunctive relief which is necessary.

Once an injunction is issued, that injunction stands under court procedures until there is a supercedious, which customarily requires a bond; and those injunctions are very effective. The remedy of prohibiting the steel or other goods from coming into the coun-

try, I think, is fundamental. The added remedy of damages, I think, is also very therapeutic and will be very much of a deterrent to future violations of the law.

Now, Mr. Chairman, the whole case really is succinctly presented in the International Trade Commission decision of 1984 when the ITC, by a three to two vote, ruled that there ought to be restrictions on steel imports. And in 1984, Senator Heinz and I visited with every one of the relevant Cabinet members in an effort to get that ITC order upheld. We talked to the Secretary of Commerce, Mr. Baldrige. We talked to the Trade Administrator, Mr. Brock. We talked to the Secretary of Defense. We met with the Secretary of State at the Republican National Convention in Dallas, a meeting that I am sure Senator Heinz will recollect. And the whole matter really came to a head when Senator Heinz and I met with Secretary of State Schulz. The meeting was cordial, but the substance was negative. And the substance was negative because the State Department wanted to have some additional leverage on foreign policy, through administration control of what would happen as to upholding the ITC order limiting steel imports.

Mr. Chairman, blacks, women, and litigants generally have received justice when they can go to court and they can have a remedy impartially administered under the law, as opposed to relying upon a political decision. For a variety of reasons, the administration would seek to trade off industry and jobs for foreign policy or other considerations. S. 1655 still leaves the administration latitude, if there is a real national security interest or a substantial interest, to step in.

But absent that, Mr. Chairman, I would urge that the Finance Committee should lend its support to this bill. It is, as I said, essentially a remedy. That is why it went to the Judiciary Committee, and it has been sent here on the request of the Finance Committee. And I am delighted to have your guidance and the assistance of staff, and there have been some very intensive conversations on the bill; and I very much appreciate your help, Mr. Chairman and Senator Heinz. You, Senator Danforth, and I have met in your office and we have talked about it—not more times than I would like, but perhaps more times than you would like.

There has been a lot of staff work. A trade bill has come out of the House of Representatives where this provision essentially has been put in. Others in the U.S. Senate have put in similar legislation; and I do think that there will be trade legislation this year. Trade Representative Clayton Yeutter was in Philadelphia last night for a Republican State Committee dinner. I had the pleasure of speaking with him and lobbying him both at the dinner table and from the podium on this measure. I think it is plain that there is going to be some trade legislation. This is not protectionism.

We have worked on it and have had repeated meetings with all the Cabinet officers on it, and I think the time has come to pass it. I would urge support by this very distinguished committee. I do thank the committee for convening on this on a day when the Tax Conference is in session. I know how busy you are. Thank you.

Senator DANFORTH. Senator Specter, thank you very much. Dumping cases are pricing cases. They have to do with pricing practices; and I guess the most comparable sort of case or sort of

legislation would be the Robinson-Pattman Act. There is a defense in the Robinson-Pattman Act for meeting competition. In other words, the Robinson-Pattman Act allows discrimination among buyers in pricing practices if that discrimination is justified. There is a justification for price discrimination if it is necessary to meet competition. If we were to provide a judicial remedy for dumping, would it make sense to have some exception or exceptions, especially in the case of pricing which is necessary to meet competition? Let me give you an example.

Let's suppose that I am producing something in, say, Japan; and our market is closed. My Government is protecting me and we are able to charge high prices in our domestic market. We want to sell this product abroad, and the foreign market is competitive. There are several people selling the same product, so the price is lower abroad than it is at home. Under that sort of circumstance where it is necessary to meet competition, wouldn't it make sense to provide a defense?

Senator SPECTER. Mr. Chairman, my reaction is negative; and a couple of thoughts come immediately to mind. One is that it would be a very rare situation—of course, this doesn't go to your point. When Great Britain subsidizes steel at $250 a ton, they are coming in under LTV steel prices; but the other thought which comes to my mind—and I would want to reflect on the question further—is that the case you cite in Japan ought not to be carried out so that the Japanese exporter to the United States can use a closed market, which has excluded Americans from——

Senator DANFORTH. I think I focused too much on the cause of it, but it seems to me that there are cases perhaps where a manufacturer of a product is able to charge a higher price at home because the foreign market is more competitive than the domestic market. And therefore, in order to meet competition in an entirely different market, they would have to reduce prices. The prices may be above the cost of the manufacturer; he is still making a profit, but it would be below the cost in the domestic market. Under that circumstance, where otherwise he is just out of business in the market, is it necessary under all circumstances to charge as much on the foreign market as you do on the domestic market?

Senator SPECTER. Mr. Chairman, I don't know that you can modify your hypothetical to eliminate the problem that I was starting to suggest, unless the transportation costs are so high from, say, the United States to Japan or any foreign market. If they are able to sell them in their own market at a high price, they are doing so because importers into their market are being kept out.

Senator DANFORTH. Maybe and maybe not.

Senator SPECTER. Well, what is the other circumstance? If the United States is selling a widget in the United States, why wouldn't we sell it in Japan if we could and transportation costs and what elses?

Senator DANFORTH. Maybe there are other suppliers of the same goods that have distributors and advertising campaigns in the United States but don't have them in Hong Kong or Taiwan, or some place.

Senator SPECTER. I think that if the market in Japan or Hong Kong or Taiwan is such that the Japanese manufacturer in Japan

can sell it at a very high price, then the American competitor would be in Japan very fast. So, I think there is a necessary interrelationship as I focus, on the spot, on your hypothetical, with the close-off of the market, say, in Japan.

Senator DANFORTH. Let me just ask you this. Even within the domestic market, there are in the Robinson-Pattman Act circumstances under which differentiation in price is justifiable, and it is a defense under Robinson-Pattman. Can't you imagine circumstances where a price differentiation would be a defense in a dumping case?

Senator SPECTER. Yes, I think I can exercise my imagination to that extent.

Senator DANFORTH. I mean, one example could be: Driving to work today, I turned on the radio and a car dealer was saying "Prices slashed; inventory is too high." And you hear that all the time, you know. People have bargains that they offer. You know, January white sales and whatnot. And there are cases, I think, where it may be that inventory would have built up so high or expectations of the market would have been so great that they end up being embarrassed, having a huge inventory; and they just have to move the stuff.

Senator SPECTER. Mr. Chairman, I am prepared to work with you on exceptions which pose problems in the competitive marketplace. The thrust of my bill is really quite different.

Senator DANFORTH. Yes.

Senator SPECTER. It is a situation where, say, LTV is selling steel on the American market, and Great Britain is bringing it in, not to meet LTV's price, but to sell it so——

Senator DANFORTH. I think I understand your problem and that you understand mine. I mean, I understand that you want available remedies for real-life problems. You don't want——

Senator SPECTER. Precisely.

Senator DANFORTH. You don't want some injured American manufacturer to be out in left field forever in a dumping case; and what I want is sufficient flexibility so that we don't have perverse effects from whatever remedy we are fashioning. And what I would hope from you—and I am willing to work with you on this—but what I would hope from you is, if we could attempt to address between us or among us, whoever else wants to enter into this, if we could attempt to address some of the practical problems that might arise.

Senator SPECTER. I think that is a very constructive approach, Mr. Chairman. I would be delighted to do that.

Senator DANFORTH. Thank you. Senator Heinz?

Senator HEINZ. Mr. Chairman, thank you very much. I think the two of you have echoed my feelings that we want to include, if we possibly can, Senator Specter's provision in legislation from this committee. And I think there is a way to do that, to illuminate some of the similarities and differences between your approach, Arlen, and the House approach. Let me ask you this. The House has a somewhat similarly constructed amendment—the Guarini amendment—which gives a private right of action to plaintiffs to sue a large number of people—foreign manufacturers, importers, distributors, other domestic buyers—if the product that they are

dealing in was to their knowledge dumped or they had reason to know it was being dumped.

How would you react to the House proposal? How different do you view it from your own? Is it better or worse? Is it parallel? How do you view that?

Senator SPECTER. I do not——

Senator HEINZ. How do you view that as an alternative or in conjunction with your own?

Senator SPECTER. I do not favor cutting a broader remedy than is necessary at this moment to meet the central problem. It is tough enough to get legislation enacted and signed by the President which is narrowly drawn, and that is why I am only looking at the exporter. I want to stop the motivation of the exporter to send in subsidized or dumped goods. I haven't discussed violations of the Multifiber Act, which are very injurious to the textiles and apparel; but if the exporter can be enjoined, so that the goods never get to the shore, that is ideal. If that cannot be accomplished in time to prevent them from coming in, then the damage remedy ought to be present; and that would deter others from bringing dumped goods into the country. If you start to sue importers because they had reason to know goods were dumped, and start to have a broader range of prospective defendants, I think it just complicates the issue. I am not looking for more people to collect damages from, frankly. I am trying to stop the goods from coming in.

There is an analogy with burglary and the receipt of stolen goods, when there is an effort to prosecute the receivers. It is more complicated, and I would not like to complicate the matter. I think we ought to take only the first step; perhaps it could be expanded at a later time, if the first step is insufficient. But I think it would be unwise to expand the range of defendants too far at the outset.

Senator HEINZ. Now, there are going to be some people who are going to testify—there will be supporters of your bill and opponents of your bill—but some of the opponents are going to testify that your bill is not GATT-legal. They will make the argument that the antidumping code language says that dumping duties are to be the only remedy for dumping. How do you respond to that?

Senator SPECTER. My legal opinion is that the bill is consistent with the GATT. There have been extensive hearings in the Judiciary Committee on that issue, with trade experts and lawyers more qualified than I to consider compliance with the GATT. Legislation was introduced prior to the time that I came to the Senate, so some of these opinions as to GATT legality go back to 1979. No one in this room will be shocked to hear that lawyers have different opinions on the compatibility of this bill and the GATT. But I think there is ample basis for concluding that the bill is consistent with the GATT.

Senator HEINZ. What is the principle argument? What is the structure of the principle argument that contends that there is GATT legality here to your bill?

Senator SPECTER. Well, there is nothing in the GATT which stops a signatory country from requiring that imports essentially be freely and fairly traded, nothing which entitles the exporting country to subsidize its goods or have its manufacturers dump their goods. Those are violations of the most basic principles for free

trade and nothing in the GATT stops a signatory country from preventing them.

As to the remedy for customs fraud, the Multifiber Agreement has already passed the test of GATT. If somebody violates the Multifiber Agreement, there ought to be a remedy, and we simply can't wait for the Customs Service to get to the issue.

Senator HEINZ. Senator Specter, thank you.

Senator SPECTER. Thank you, Senator Heinz.

Senator DANFORTH. Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman. I apologize that I have to leave. We have the Tax Conference, which I assume you will also be attending, which starts at 10 a.m.

I am sorry to miss this because I know Senator Specter has been working hard on this for many years. So, I will look over his testimony and that of the other witnesses. I must say this bill gives me some problems. I have my own concerns about the D.C. Federal District Court getting involved in trade cases and trying to decide these incredibly complex matters. We have specialists under the ITC and in other agencies who now deal with these matters. But the fact that Senator Specter has spent so much time on it obviously means that there is a good deal to be said for it. So, I would like to——

Senator SPECTER. I have had occasion over the past 5 years to bend your ear on a few well-chosen occasions, Senator Chafee.

Senator CHAFEE. Yes. I thought I would throw you out a nice one by saying that you support this idea so there must be something to it. [Laughter.]

Senator SPECTER. There is something more to it than that good reason. [Laughter.]

Senator CHAFEE. In any event, Mr. Chairman, I am sorry I cannot stay and I want to congratulate Senator Specter both for his initiative on this and also for his persistence. No one will ever fault the junior Senator from Pennsylvania for lack of persistence. Thank you.

Senator SPECTER. That is quite a compliment coming from one of my keenest squash opponents, who is tops on persistence himself.

Senator CHAFEE. My only persistence is vainly challenging Senator Specter and hopefully seeking a win on occasion, but regretfully, rarely. Thank you.

Senator DANFORTH. Senator Specter, thank you very much.

Senator SPECTER. Thank you very much.

Senator DANFORTH. Next, we have from the administration, Alan Holmer, General Counsel, USTR, and Gilbert Kaplan, Deputy Assistant Secretary for Import Administration, Department of Commerce.

Along with Senator Chafee, I am going to have to leave for the Tax Conference, and I want to apologize to all witnesses for not being able to be here for your testimony.

Senator HEINZ. I was afraid that you were going to apologize for the chairman who is going to follow you.

Senator DANFORTH. No. I want to thank the chairman who is going to follow me for handling this. I would like to—although this is a little bit out of order—just put a question to Mr. Holmer and

Mr. Kaplan and then leave and then ask you to proceed with whatever you would like to say.

Senator DANFORTH. Let's assume, and I do assume that Senator Specter has a point, that he has a real beef, that dumping cases can be prolonged, that relief might be difficult to come by, and after you are hit by it you are back in the same situation all over again. He wants something that is more manageable than the present system.

Are you here just to say we want the status quo, or are there some possibilities in your judgment of attemptimg to address the concerns that Senator Specter has pointed out, perhaps in a somewhat different manner?

Mr. HOLMER. How would you like us to proceed, Mr. Chairman?

Senator DANFORTH. What I would like you to do—because I again apologize for having to leave this hearing to attend the Tax Conference over on the House side—but what I would like to do is to ask my question first and then leave and let you proceed with your testimony.

Mr. HOLMER. Sure. Mr. Kaplan and I both have a number of points that we both wanted to have a chance to make about the bill and why it is that we find the bill unacceptable.

Senator DANFORTH. I understand. I want you to have all the opportunity you need to do that.

Mr. HOLMER. I appreciate that.

Senator DANFORTH. My hope is to ask you a more positive question. I mean, is there some basis for Senator Specter's concern about the present system, and is there anything that can be done to make the present system more workable and to address the concerns of Senator Specter?

Mr. HOLMER. Right. That is a fair question. The one issue that I know has concerned a number of us in the administration, including Mr. Kaplan and Secretary Baldrige and Ambassador Yeutter, is the whole question of multiple offenders—a situation where you may have a company that has violated the dumping laws on many occasions. It seems to me that there is a very, very fine line that one could walk in crafting a remedy to be GATT consistent. There are three key principles that I consider essential in satisfying our GATT obligations. The first is that it would need to be a proposal that just doesn't simply duplicate the dumping statute or take the dumping statute and graft a new remedy onto it.

Congress could conceivably single out some other characteristic, something like a separate antitrust remedy that I know your staff has been looking at, and establish some kind of private action against intentional, gregious kinds of dumping. That would be the first principle. It has to be something separate from a strict dumping statute.

Second, it has to be something that would be consistent with the national treatment standards of article 3 of the GATT and, in that respect, whatever you design would have to put domestic and foreign products as well as domestic and foreign companies on some kind of equal footing. And third, you can't have a situation where injunctive relief in the form of an embargo is imposed where a

court is able to stop the import of that product into the United States. That just runs flat into article XI of the GATT.

So, those, it seems to me, are the three guiding principles that the committee needs to consider very carefully in crafting a remedy to make it GATT consistent. Now, Mr. Kaplan and I are not antitrust lawyers; and more importantly, neither of us can speak for the administration on antitrust policy. If you were to try to craft an antitrust remedy, we would need to get the people from the Justice Department involved as well to get their comments.

But strictly from a GATT standpoint, it seems to me those are the three criteria you need to look at; and then, beyond that, once you try to craft that kind of remedy, I think we need to take a very, very hard and careful look at whether or not that proposal would be in the economic interests of the United States and whether or not we would want to have that kind of standard be applied to U.S. exporters, who also dump on occasion. Mr. Kaplan, do you have a comment?

Mr. KAPLAN. I might just add that Mr. Holmer and I have spent about the last 2 months working full time on problems of the U.S. semiconductor industry, and we are very concerned and very aware of problems of recidivous dumping. I think if some other kind of remedy were to be proposed or to be crafted, I think it should focus on your recidivist continuing problem and not run-of-the-mill sort of dumping, which I think is taken care of very adequately by the current dumping law.

The second proposal covers every kind of dumping—inadvertent, advertent, 1 instance, 20 instances. That definitely is something that goes too far. So, you would want to look at something in the antitrust context perhaps that looks at recidivism and looks at knowledge of continuing dumping.

Senator DANFORTH. Presumably, if we did that in the antitrust context, the remedy would be judicial.

Mr. HOLMER. Yes.

Senator DANFORTH. Good. Thank you very much, and please proceed with your testimony; and Senator Heinz, thank you.

Senator HEINZ. Thank you, Senator Danforth. Mr. Holmer.

STATEMENT OF HON. ALAN F. HOLMER, GENERAL COUNSEL, U.S. TRADE REPRESENTATIVE, WASHINGTON, DC

Mr. HOLMER. Mr. Chairman, thank you very much. Mr. Kaplan and I have five points between the two of us that we would like to make. He will make three and I will make two.

My first point is that S. 1655 violates our international obligations under the GATT and the Antidumping Code. The dumping code expressly limits the remedy for dumping to the collection of duties to offset the margin of dumping. Article 16, paragraph 1 of the code states that no specific action against dumping of exports from another party can be taken except in accordance with the provisions of the General Agreement as interpreted by this agreement. And article 8, paragraph 3 states that the amount of the antidumping duty must not exceed the margin of dumping.

This language prohibits the use of additional sanctions such as fines or embargoes, imprisonment, or other draconian measures. As

Senator Specter indicated, there is some degree of disagreement, although I would encourage you to talk to your committee trade counsel or to other lawyers who will be testifying today. We feel very strongly that article 16, paragraph 1 does preclude anything along the lines of the Specter bill.

Beyond that, it would also violate the national treatment rules found in article 3 of the GATT and in many of our bilateral friendship, commerce, and navigation treaties. Article 3, paragraph 2 of the GATT requires that the United States treat the products from other countries no less favorably than products of U.S. origin. The problem with S. 1655 is that, under its rules, the same conduct by two firms—one foreign and one domestic—could be deemed unfair competition subject to embargo in the case of a foreign firm, but not punishable at all in the case of a domestic firm. This is a denial of national treatment.

S. 1655 would also violate article 11 of the GATT, which generally prohibits embargoes or other quantitative restrictions. There are other ways in which S. 1655 violates the GATT, but those are the high spots. And obviously, we are concerned about GATT violations because they provide a legal basis for our trading partners to retaliate against U.S. exports. At a time when we are attempting to lead the rest of the world into a new, more effective international trade regime, the last thing we feel we should be doing is to walk away from our international obligations when they become inconvenient.

My second point, Mr. Chairman, is that our companies dump, too. The United States leads the world in the number of dumping actions that have been filed against its companies. These statistics reflect our status as the world's largest exporter. But we should think twice before we expose our exporters—for example of paper or fertifilizer or corn or sugar or chemicals or machinery—we should think twice before we expose them to the risk of embargoes or extra antidumping penalties. I suspect our trading partners would be happy to match us dollar for dollar and injunction for injunction.

Thank you, Mr. Chairman.

Senator HEINZ. Mr. Kaplan.

[The prepared written statement of Mr. Holmer follows:]

Testimony on S. 1655

Alan F. Holmer, General Counsel
Office of the U.S. Trade Representative

before the Subcommittee on International Trade
United States Senate Committee on Finance

July 18, 1986

Mr. Chairman, and Members of the Subcommittee, I appreciate the opportunity to testify before you on S. 1655.

At the very outset, I want to emphasize that the Administration is committed to an active and aggressive trade policy. We are pushing forward on a number of fronts. First and foremost, we are on the verge of launching a New Round of Trade Negotiations. We expect these negotiations to strengthen and extend GATT disciplines and to shape the world trading system into the 21st century. Second, we have joined with the major industrialized countries in the Group of 5 to address the underlying economic factors that led to a substantial rise in the value of the dollar. The Plaza Agreement of last fall and the Tokyo Summit agreement of this spring are important steps toward reducing the large swings that have affected trade flows in the past.

Although we have pushed for greater multilateral cooperation with our trading partners, we have not hesitated to enforce our trade laws against unfair foreign competition. Like you, we are committed to the effective enforcement of the unfair trade laws. We cannot and will not allow American firms and workers to suffer injury from unfair foreign competition.

We have carried out this commitment. Last fall, the President directed Ambassador Yeutter to take the unprecedented step of self-initiating four section 301 investigations and accelerating action in two others. In negotiations with Japan and the European Communities over leather, semiconductors and EC enlargement, we have demonstrated our commitment to prying open and keeping open vital overseas markets for American exporters.

In the same fashion, we have aggressively enforced the dumping and countervailing duty laws against foreign governments and foreign firms that seek to obtain an unfair competitive advantage in our market through dumping or government subsidies. And our negotiations, ongoing at this very moment, to open up the Japanese semiconductor market are aimed as well at eliminating dumping in our market and in other markets around the world.

I turn now to S. 1655. Mr. Chairman, the Administration understands and shares Senator Specter's concern about the impact of foreign dumping. But the Administration strongly opposes this bill.

In reviewing S. 1655, we have given careful attention to the international obligations of the United States as set out in the GATT and the 1979 GATT Antidumping Code. If we violate our international obligations, other nations have a right to retaliate against U.S. trade under the rules of the GATT and the Tokyo Round Codes. We should not expose our exporters to this risk. We have also considered the possibility that foreign governments could enact "mirror" legislation. We should not enact rules unless we are prepared to live by them in our own trade.

Mr. Chairman, we believe that S. 1655 is fundamentally flawed. From the standpoint of U.S. trade policy, the bill would make the Antidumping Act of 1916 into a protectionist windfall for U.S. plaintiffs. It would represent a clearcut violation of the GATT and would invite foreign retaliation against U.S. exports. It would encourage foreign governments to enact mirror legislation with the aim of exacting draconian antidumping sanctions from American exporters, who are frequently the target of antidumping proceedings abroad. Moreover, there is no reason to believe that the bill's judicial remedies for dumping would work as quickly or effectively as existing administrative remedies.

The bill is equally troubling from the standpoint of our overall economic policy. It would deter legitimate business behavior by imposing excessive sanctions on borderline violations of the law. While purporting to be an antitrust remedy -- a bill to promote competition -- it proposes import embargoes as a preferred remedy. Mr. Chairman, this bill is decidedly not in the overall economic interests of the United States.

1. The Antidumping Act of 1916

The Antidumping Act of 1916 grants a private right of action against predatory dumping in the federal courts. S. 1655 would amend the 1916 Act by weakening the standards for liability under that Act and by creating a new private right of action for customs fraud. To make it easier to establish liability, the bill would drop the requirement of predatory intent. It would also create a rebuttable presumption of antitrust liability if either the Commerce Department or the U.S. International Trade Commission has issued an affirmative finding in an administrative antidumping proceeding. The bill also encourages the courts to issue injunctions barring the future importation of products found to have been dumped.

The basic assumption of the bill is that an antitrust remedy in the federal courts will provide faster, more effective, less expensive and timelier relief to U.S. industries than our current system of administrative remedies. We disagree. S. 1655 is more likely to encourage endless and expensive litigation in

the federal courts of the sort we have seen in the antitrust field. Unlike the anti-dumping laws, the Federal Rules of Civil Procedure, which would govern litigation of claims under S. 1655, do not contain strict time limits for resolution of antidumping petitions. Also, the liberal discovery provisions of the Federal Rules would permit antidumping defendants to engage in extensive discovery to support antitrust counterclaims and the inevitable affirmative defenses that dumping did not occur, that the imports did not cause the injury claimed, or that the industry has not been materially injured. The requisite proof of damages would involve complex econometric analyses, the use of outside experts, and protracted cross-examination, as in antitrust cases. The primary beneficiary of S. 1655 would be an army of Wall Street lawyers engaged in years of protracted (but well-paid) litigation.

In contrast, our current system of administrative remedies for dumping can result in the imposition of offsetting anti-dumping duties in less than a year. Under current law, the Commerce Department and the U.S. International Trade Commission are charged with the responsibility for conducting antidumping investigations. In these highly accelerated administrative proceedings, it is the Federal Government, not domestic industry, that undertakes the burden of investigating allegations of injurious dumping. If the Commerce Department finds that dumping has occurred and the ITC finds that imports are causing or threatening material injury to a U.S. industry, then an antidumping duty is imposed to offset the margin of dumping.

The Commerce Department and the ITC have enforced the law vigorously and well. In the Trade Agreements Act of 1979, Congress comprehensively revised the antidumping statutes. These revisions were designed to correct some of the abuses of the past. The Commerce Department and the ITC have carried out this Congressional mandate. They have conducted a record number of antidumping and countervailing duty investigations in the past 5 years. They do not miss deadlines. The law is being enforced. And we have seen the dramatic immediate effect that a positive finding of injurious dumping can have on imports of the dumped goods.

Apart from these administrative remedies, our companies also can pursue normal avenues of antitrust relief if foreign companies have engaged in predatory pricing or other forms of monopolistic or anticompetitive behavior. Since Judge Learned Hand's landmark opinion in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir., 1945), it has been clear that the Sherman Antitrust Act can reach anticompetitive conduct that takes place abroad. Accordingly, if a company concludes that administrative relief is inadequate and chooses to pursue an antitrust claim, it can do so under current law.

Under these circumstances, I see no need for new antidumping

legislation or for reform of the 1916 Act.

The lack of any apparent need for a new system of private remedies becomes even more troubling if one considers the other policy consequences of the bill.

2. The GATT

S. 1655 would represent a clearcut violation of the GATT. Both the GATT and the Antidumping Code authorize the countries party to them to levy antidumping duties to counteract injurious dumping. The GATT rules on tariff concessions generally prohibit any country that has given a tariff concession from impairing it by adding any extra duty or charge of any kind imposed in connection with importation. But since the drafters of the GATT recognized that injurious dumping should be condemned, they created a special exception in Articles II and VI to allow the imposition of antidumping duties.

The Antidumping Code, however, expressly limits the remedy for dumping to the prospective collection of antidumping duties to offset the margin of dumping. Article 16 of the Code states: "No specific action can be taken against dumping of exports from another party except in accordance with the provisions of the General Agreement, as interpreted by this Agreement." This language prohibits the use of additional sanctions, such as fines, or embargoes, imprisonment or other draconian measures.

S. 1655 would violate this rule in three ways. First, the bill would authorize the collection of punitive treble damages on top of the normal collection of antidumping duties. Second, S. 1655 would permit unlimited retroactive damages, instead of the essentially prospective remedy contemplated by the Code. Finally, S. 1655 authorizes the courts to issue equitable relief, including injunctions banning the importation of dumped products. These remedies are far in excess of those authorized by the GATT or the Code.

S. 1655 would also violate the national treatment rules found in Article III of the GATT and in many of our bilateral friendship, commerce and navigation (FCN) treaties. Article III:2 of the GATT requires that signatories treat the products of other signatories "no less favorably" than like products of national origin. Similar provisions in most FCN treaties require national treatment for nationals, companies and products of our treaty partners. Under the rules in S. 1655, the same conduct by two firms, one domestic and one foreign, could be deemed unfair competition subject to treble damages in the case of the foreign firm, and not punishable at all in the case of the domestic firm. This is a denial of national treatment.

I note that a number of arguments have been put forward in

an attempt to show that S. 1655 is GATT-legal. It has been argued, for example, that "neither the GATT nor the Code deals with private remedies, pursued in ordinary law courts, seeking redress for past injuries caused by other private parties through behavior that may also be 'dumping' at which duties may be aimed in the future." But the claim that an antitrust suit is a purely private action cannot withstand close analysis. A cause of action in the federal courts necessarily involves the use of state power to enforce legal rights created by the Congress and adjudicated by the federal courts. To create a new cause of action for dumping, Congress must enact a law amending the Antidumping Act of 1916. Absent a law, the plaintiff could not file a claim. The case would be heard by a federal court. The courts are an arm of the United States Government under Article III of the Constitution. In short, litigation under the Antidumping Act of 1916 clearly involves government action and goes far beyond the realm of purely private affairs.

It has also been argued that "the Code also does not affect other actions that are not in the nature of 'duties' that may affect goods that are 'dumped.'" The thrust of this argument is that if a government chooses to address dumping through the imposition of duties, it must do so under the procedures set out in the Antidumping Code, but at the same time, a government is free to use any other means that it chooses to punish dumping. This interpretation of Article 16, however, appears rather implausible if one considers its consequences. Under this view, a foreign government would be perfectly within its rights to convict an American businessman of dumping and imprison him for a period of 10 years, since the government would have a right to use whatever alternative sanctions for dumping it pleased.

It follows that Article 16 must stand for the proposition that a government can provide its citizens one, and only one, remedy for dumping. That remedy is the collection of duties in a manner consistent with the Antidumping Code. We believe that our reading flows logically from the letter and spirit of the GATT and the Antidumping Code. It also follows that S. 1655 would violate the Code by imposing additional sanctions on top of normal antidumping duties.

While the same criticism can be levelled at the Antidumping Act of 1916, that Act was "grandfathered" by the Protocol of Provisional Application when the U.S. joined the GATT in 1947. Because of this legal technicality, the 1916 Act in its present form is legal under the GATT. But under GATT rules, a signatory loses the so-called "grandfather clause" exception for "existing legislation" when it amends a GATT-inconsistent law in the manner contemplated here. The drastic amendments contemplated by S. 1655 would greatly ease the standards for antitrust liability and would result in the loss of the "grandfather clause" exception. In short, if S. 1655 is enacted into law, I can safely

predict that the Contracting Parties would condemn our action as a violation of the GATT.

3. Retaliation

In weighing reforms of our trade remedies, we must consider the overall economic interests of the United States. While it is easy to advocate taking action against foreign producers, we should consider the potential consequences for our export industries. These exporters are our strongest and most competitive industries and represent the cream of our manufacturing and agricultural sectors.

If the United States enacts protectionist legislation or restricts imports, our trading partners will retaliate against our exports. International trade rests on a delicate balance of perceived mutual economic advantage. If we restrict imports or exact punitive sanctions from foreign companies, other governments will retaliate against our goods and our businessmen. It is that simple.

Given the manifest GATT-inconsistency of S. 1655, I have no hesitation in predicting that foreign governments will retaliate if our courts start awarding judgments against their companies. We would leave them little choice but to do so.

5. Mirror Legislation

We should also think about the possibility of mirror legislation. Many of our major trading partners have antidumping statutes, including Canada, the European Communities, Australia, Japan, and Mexico. If we enact new antidumping remedies, our trading partners would be well within their rights to enact copycat, "mirror" legislation. We could scarcely complain if they did so.

Mirror legislation is likely to have an adverse impact on a number of American businessmen. A GATT Secretariat study of antidumping actions from 1980 through 1984 revealed that the United States led the world in the number of antidumping cases that have been filed against it.

These statistics reflect our status as the world's largest exporter. We should think twice before exposing our kraft liner paper, fertilizer, corn, sugar, potato, chemical, and machinery exporters to the risk of embargoes or extra antidumping penalties. I suspect that our trading partners would match us dollar for dollar and injunction for injunction.

5. Economic Policy

S. 1655 raises a number of troubling questions in terms of

our overall economic and competition policies. Although the bill purports to be an antitrust remedy, it appears to be aimed at creating a windfall for U.S. plaintiffs through the use of presumptions, extreme discovery sanctions, and the elimination of normal intent requirements for antitrust liability, rather than addressing legitimate concerns regarding predatory dumping and its effects on competition.

Since the thrust of our antitrust policy is to raise consumer welfare by encouraging active price competition, it seems rather odd for S. 1655 to actively encourage injunctions against further importation as a remedy. The effect of such injunctions would be to stifle, rather than promote, competition. Similarly, while S. 1655 would make the issuance of a Commerce Department or an ITC finding a rebuttable presumption of liability for damages, it is unclear why such a finding is prima facie evidence of liability for past damages. A Commerce Department investigation focuses on a six-month period immediately preceding the initiation of an investigation. This snapshot says a great deal about this particular period, but it may say very little about competition outside that period. In situations where industries have been competing over a long period of time under changing market and economic conditions and widely varying foreign exchange rates, it is difficult to see why a Commerce or ITC finding provides a basis for liability.

Finally, I believe that by imposing excessive sanctions, S. 1655 runs the risk of deterring legitimate price competition. While we must be vigilant in protecting our industries from unfair foreign competition, we should also remember that the American consumer often benefits from price competition from imports. Indeed, without access to competitively priced imported inputs, some of our companies could not themselves stay competitive in the world market. Therefore, we should be careful about imposing draconian sanctions on importers for small margins of dumping, sanctions which could prove more costly to the U.S. economy in the long run than the illusory benefits that they would seem to confer at first glance.

We risk deterring legitimate price competition, particularly if we punish a dumping margin of one or two percent with an import embargo, as S. 1655 proposes to do. Such embargoes would result in higher prices for our consumers and could eliminate necessary sources of supply.

7. Conclusion

Mr. Chairman, for the reasons I've set forth above, I urge that S. 1655 not be enacted into law. I appreciate the opportunity to testify today. I'd be happy to answer any questions that you might have.

STATEMENT OF HON. GILBERT B. KAPLAN, DEPUTY ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION, DEPARTMENT OF COMMERCE, WASHINGTON, DC

Mr. KAPLAN. Thank you, Mr. Chairman. My first point is that the dumping law as currently written and currently administered basically does work; and I think the way it works in some ways is not so obvious. The minute a case is filed, an importer or a customer faces an undetermined liability, an undetermined price basically, for items, for an indeterminate period of time into the future.

If you are a purchaser of semiconductors, of pork, of wire rod, or any other product, you have to think very long and hard before buying from an exporter given that undetermined liability that you are going to face for quite a number of years. There have been 322 dumping cases filed since 1980. Only in 17 of those has the Department of Commerce gone to a final negative determination. The margins in many cases have been very high, ranging to 188 percent for semiconductors, 106 percent for cellular mobile telephones, 130 percent for Argentina oil country tubular goods. These margins and these number of cases have to affect trade, and they have to prevent unfair trade.

My second point is that a private right of action for damages does not make good common sense, either economically or legally. You have to fit a remedy to a wrong remedy. You cannot just choose for some indeterminate kind of activity an overwhelming remedy that would prevent all sorts of related kinds of activities. I think this bill would have enormous trade chilling effects because very few foreign producers, except perhaps for those who had enormous deep pockets, would be willing to sell into this country and face treble damages and other draconian penalties.

I think Senator Danforth had it right when he said there is no meeting competition defense here; and that is a very important factor. A party can dump for a lot of reasons, some of which he doesn't even know; but if you have a market which, for some reason, is less competitive, not because there are import barriers, but because there are less producers, for example, you could very well have a higher price in that foreign market than you do in the United States, which on the whole is a very competitive market, both because of the strength of many of our producers and because of foreign competition.

So, you have a producer selling here. In order to meet that competition and be a factor in our market, he may have to dump, perhaps intermittently, perhaps to a very small extent. As a result of that dumping, he is liable under this statute, not just for the amount of the dumping, but for any damages resulting from imports which are dumped. It is not limited to the amount of the dumping. So, if he dumps to the extent of $1, he could be liable for an enormous amount of damages resulting from the imports and not just the dumping.

A foreign producer may not even know whether he is dumping. He doesn't know offhand what benchmark we are going to look at when we start a dumping case. He doesn't know what effect currency fluctuations might have between the time he signs a contract and actually sells and the time the investigation starts. He doesn't

know what such or similar merchandise we are going to be basing our comparisons on. We often don't find precisely the same merchandise in foreign markets, and we have to make adjustments based on different kinds of merchandise. This is the sort of thing a foreign exporter cannot predict.

Finally, I think this bill has some major impracticalities in it. Contrary to what I think Senator Specter said, I think it will take a very long time and be very expensive for any plaintiff to receive damages or any relief under this bill. You are going to have to have discovery. You are going to have to have depositions. You are going to have to have a trial in most instances.

An average dumping case goes to a preliminary determination in 160 days. I would be very surprised if this bill were passed, and we looked at it with some hindsight, if any relief were available in 160 days to the average plaintiff. Second, the ban of imports for a breach of discovery is a purely draconian remedy. You are talking about somebody who may not be able to produce certain documents being forced to simply have his goods seized at the port, which is pretty far fetched. A point that hasn't really been focused on is that this bill is not only a private right of action for dumping; but it is also a private right of action for subsidization because the way that the cost of production is calculated is to include subsidies, in effect.

This means that courts would be getting into the Government relations in determining what is or is not subsidization.

The final point is that this bill would interfere with our dumping cases in a sort of subtle way in the sense that the dumping finding becomes prima facie evidence of whether there is or is not dumping in the subsequent court cases. Our dumping cases are essentially summary administrative proceedings, without full due process rights. If these proceedings became the basis, or prima facie evidence, for a final determination in the courts, then our proceedings would have to become much more complex and contested; and our law would be negatively affected, and you wouldn't have the basic rights and remedies you have under the current dumping law as a result of this addition to it.

Thank you very much.

Senator HEINZ. Mr. Kaplan, thank you very much.

[The prepared written statement of Mr. Kaplan follows:]

TESTIMONY OF GILBERT B. KAPLAN
DEPUTY ASSISTANT SECRETARY FOR
IMPORT ADMINISTRATION
BEFORE THE SENATE FINANCE COMMITTEE
SUBCOMMITTEE ON INTERNATIONAL TRADE
JULY 18, 1986

Good Morning, Mr. Chairman and distinguished members of the Subcommittee. I am pleased to appear before you today to discuss S. 1655, the "Unfair Foreign Competition Act of 1985."

The Administration strongly opposes the private remedy to dumping which appears in S. 1655.

There are several reasons for our opposition. One, we believe the current antidumping law is effective in offsetting unfair injurious dumping in the vast majority of cases. Two, this bill is inconsistent with our international obligations under the General Agreement on Tariffs and Trade (GATT). Three, we believe relief under this bill would take longer to achieve and at a greater expense to U.S. industries. Four, I do not believe dumping is the kind of practice which should lead to a private right of action. Finally, we also have certain other specific problems with S. 1655. Let me take these points one by one.

First, the antidumping law works. It works so well that it (along with its companion, the countervailing duty law) has become the primary vehicle for ensuring fair trade between the United States and its trading parners, while not insulating U.S. industries from the beneficial effects of fair international competition.

As I have stated in previous testimony, the Commerce Department has proven that it can act quickly and effectively. We have provided relief from unfairly traded imports to every sector of the American economy. We have investigated products as diverse as steel wire rod and galvanized steel sheet, frozen lamb meat, raspberries, cellular mobile telephones and cell site transceivers, fresh Atlantic groundfish, pots and pans, mirrors, float glass, and semiconductors.

In the 282 antidumping investigations initiated between 1980 and 1985, the Commerce Department has declined to initiate only eight antidumping petitions, because these did not fulfill the statutory criteria for initiation. We made final negative determinations in only 17 of these cases, while 104 petitions were withdrawn by petitioners in the same period (for the most part because of voluntary restraint agreements on steel). As a result of antidumping cases filed, 18 steel arrangements are in place, covering 81 percent of all steel imports. Currently, we are conducting 41 antidumping investigations and 124 antidumping orders are under review.

Thus, when dumping is brought to our attention, we catch it and redress the situation within six months by reaching the stage of collecting provisional antidumping duties. The current law is effective.

My second major reason for opposing this bill is that it is, in my opinion and despite the arguments I have heard from my learned colleagues, clearly GATT-illegal. I concur fully with the arguments on this point set forth in the testimony presented today by Alan Holmer, General Counsel of the Office of the United States Trade Representative. Suffice it to say that I do not believe a private remedy can be read to be consistent with Articles 16.1 and 8.3 of the GATT Antidumping Code as they interpret Article VI.2 of the GATT itself.

The third reason we oppose S. 1655 is that a court-administered remedy will take longer and will be much more costly than the antidumping law. One of the major arguments in support of this bill has been that it would expedite resolution of dumping cases, for less than the cost of the present administrative procedures. In my opinion, enactment of this legislation would have the opposite result. The cost of the litigation would be prohibitive for small businesses.

Unlike the provisions of the antidumping law, the Federal Rules of Civil Procedure, which would govern the litigation of claims authorized by this bill, would not ensure resolution of litigation within strict time limits. In addition, proof of damages, which is not part of the current administrative procedure, would involve complicated economic analyses, the use of outside experts, and considerable cross-examination.

We all know that litigating complex issues in U.S. courts, where private respondents are given the full panoply of due process rights, including discovery, cross-examination, etc., is a lengthy procedure, often lasting years and costing millions of dollars. In contrast to this, within six months of the filing of an antidumping petition, antidumping duties may be imposed, pursuant to preliminary affirmative determinations by the International Trade Commission (ITC) and the Commerce Department. And antidumping duties are not a one shot damage award but continue to be imposed, thus offsetting the unfairly traded merchandise and allowing the U.S. industry to compete on an equal basis.

Once the dumping has been offset, which then removes the cause of injury to the domestic industry, should there be an additional private right of action against dumping <u>per se</u>? In my opinion, the answer is no.

Parties can be unaware that they are engaging in dumping. These laws are not simple. For example, many companies which have not been exposed to antidumping laws believe dumping only occurs when you sell below the cost of production, not realizing that selling in the export market at a price below the home market price, even if above your cost of production, also constitutes dumping.

Another feature of the antidumping law which can make it difficult for a company to predict whether it is pricing fairly is that different sales are used in different situations to determine dumping. Only foreign market sales of "such or similar" merchandise may be used; at times, determining what products are "similar" can make the difference between dumping or no dumping. While home market sales are the first choice, in certain circumstances, third country sales must be considered instead of home market sales, and in still other circumstances a constructed value is used.

A third feature with which companies may be unfamiliar concerns the U.S. law's requirement for a minimum profit of eight percent when calculating constructed value. What company, unfamiliar with the antidumping law, could imagine that the United States requires that at least eight percent profit must be included when calculating a constructed value? My staff once received a bitter call from an axle manufacturer in the Midwest, unfamiliar with the Canadian antidumping law (which has adopted the U.S. standard on profit), who was astounded to hear that we believed adding eight percent profit in his constructed value was compatible with the GATT.

Yet another reason why a company might not be able to predict whether it is dumping concerns currency fluctuations. If the home market price is 200 yen and the U.S. price is $1.00 and the exchange rate is 200 yen equal $1.00, there is no dumping. If the yen appreciated against the dollar, however, so that only 150 yen equalled $1.00, unless there were a corresponding change in prices, suddenly the company is dumping by 33 percent, because 200 yen is now worth $1.33. And there are other reasons why a company might be unaware that it is dumping.

Another problem of allowing a private right of action against dumping is that there is no defense allowed for meeting competition. A defense in antitrust cases involving price discrimination is that a manufacturer has dropped his prices to meet competition and therefore is not liable for damages. Under S. 1655, however, foreign companies could not make the same argument. Therefore, less efficient U.S. producers could collect damages in cases involving foreign companies which would not be permissible if only U.S. producers were involved.

In my opinion, a private right of action is also an inappropriate remedy for dumping because it violates the spirit of the GATT. The letter of the GATT on this issue is that governments have decided

that dumping violates international trade rules and so may be eliminated through offsetting duties. The spirit of the GATT is that the aim of this international agreement is the government-to-government resolution of international trade problems, rather than allowing national industries to frustrate healthy international competition.

Finally, apart from these problems with the concept of a private remedy for dumping, we believe that there are several other flaws in S. 1655. Those provisions of S. 1655 which authorize a court to impose an import ban in response to discovery problems are clearly overreaching, in our view. In such a case, with no conclusive proof of wrongdoing, the ultimate trade weapon is brought to bear on a foreign producer - his merchandise is banned from the United States. This is not in the economic interests of the United States.

In addition, we believe the bill's emphasis on injunctive relief is misplaced. Under the Act's provisions, the prevailing party would obtain an injunction, and damages are awarded only if equitable relief is found to be inadequate. The total ban on imports, solely because a company has been found to be dumping, is a drastic measure. There are more antidumping duty orders against U.S. companies throughout the world than U.S. antidumping orders against foreign companies. We would not want U.S. exporters to face similar laws. The threat of using such a law would surely disrupt and curtail even <u>fair</u> trade to some extent, because a company could never predict with certainty what a district court judge would do if the Commerce Department did find dumping.

The bill also authorizes the inclusion of the amount of government subsidies provided to a foreign exporter in calculating the foreign market value of the exported product. This goes beyond the definitions of unfair pricing contained in the Antidumping Code and our own law. In addition, this means that subsidies are also subject to a private right of action. Since subsidies are granted pursuant to government action, not company policy, this removes the private right of action from the realm of competition policy and antitrust. Moreover, this leads one into the area of government-to-government problems which can only become more difficult when they become entangled in private litigation.

The bill would disperse the judicial responsibility for developing antidumping law. Under the antidumping law, judicial review of agency decisions is exclusively in the hands of the Court of International Trade and the Court of Appeals for the Federal Circuit. S. 1655 would give jurisdiction to review one particular set of antidumping-type claims to both the Court of International Trade and the district court of the District of Columbia. The inevitable result of this will be a divergence among the courts in decisions in the antidumping area. The Congressional purpose in creating specialized courts will be undermined in this area of trade law.

Moreover, allowing wholesalers to act as plaintiffs in these cases opens the possibility that importers of foreign merchandise could sue other importers of foreign products. Thus, for example, nothing would prevent a Japanese subsidiary in the United States from suing a Korean company.

S. 1655 also raises substantial due process questions. The bill gives prima facie effect in damage actions to final determinations by the ITC and the Commerce Department on the issues of injury and the amount of dumping. These determinations, however, are based on investigative, nonadversarial proceedings which do not include the full range of rights available in adjudicative proceedings, such as discovery, depositions, interrogatories, and the cross-examination of witnesses. If the determination by the ITC or the Commerce Department is used to establish that a private party is entitled to damages or injunctive relief, a persuasive argument could be made that respondents are being unfairly bound by determinations in which they had less than complete rights of participation and so are being deprived of their property without due process of law.

In light of the substantial problems with S. 1655, therefore, the Administration continues to oppose strongly a private remedy to dumping.

Senator HEINZ. I really just have two questions. Both of you in effect contend that the current law is working well. What do you say to the small manufacturer who cannot afford the $250,000 worth of legal bills to go to the U.S. International Trade Commission to prosecute his case, his petition, and who when he does win, wins 6 months later, and does not have a whole heck of a lot of financial staying power, and then as the remedy becomes effective, the duties—the antidumping duties—are paid to the Government?

How do you justify your contention that our current antidumping laws really are responsive to the problems that people have in real life?

Mr. KAPLAN. I think in real life there are very few people who could not very reasonably make a cost benefit analysis and say "my business is worth X, and my business is being hurt so much; therefore, I ought to invest $100,000 or $150,000 in stopping unfair trade in imports." Very rarely have I ever heard from a businessman who comes in and says: "As a result of imports, I am losing $200,000, and you have got to do something." They come in, even the small ones, and say: "We are losing everything. We are losing millions of dollars, and you have got to do something."

That amount of legal fees, which is what you are talking about, is a very small amount, maybe not in all instances—I admit that—but for the most part, those legal fees are well spent and much better spent than they would be in years of litigation over a Specter-type bill.

Senator HEINZ. Not that I agree with your assessment that a quarter of a million dollars isn't much money, but leaving that part of your dismissal of the problem aside, what about the length of time? What about the damage that is done in the meantime? What about the fact that there is no compensation for the damage in the interim? Do you dismiss that as speedily as well?

Mr. KAPLAN. I think, in terms of the length of time, the dumping law probably works faster than this will. In terms of the damages——

Senator HEINZ. I am not talking about Senator Specter's proposal. I am talking about the problems with current law.

Mr. KAPLAN. Yes. I think you are talking 160 days to a preliminary determination. That isn't fast as court proceedings or administrative proceedings go; but it is not that slow either.

Senator HEINZ. I am not talking about whether it is fast or slow. I am talking about whether it is fast enough to, say, businesses that really are getting themselves in trouble. We just had a chapter 11 bankruptcy yesterday because of, in my judgment, the speed with which a particular trade remedy was implemented.

Mr. KAPLAN. I think that, putting aside the LTV question for a second, that on the whole if a case is filed at the time it should be filed, the dumping law is fast enough to reach a conclusion in order to help injured——

Senator HEINZ. I hope other witnesses will comment on that today.

Mr. HOLMER. If I could make one other comment on that, Mr. Chairman? A case gets filed; within 5 months, there is a preliminary determination, which can be made retroactive if critical cir-

cumstances are found to 90 days prior to that time; so there is a measurable impact on trade——

Senator HEINZ. Have critical circumstances been found in a large number of cases, and antidumping duties been imposed retroactively; and if so, on whom?

Mr. KAPLAN. Frankly, it has been rare.

Senator HEINZ. Pardon me?

Mr. KAPLAN. It has been rare.

Senator HEINZ. It has been rare? Has it happened?

Mr. KAPLAN. Yes, it has.

Senator HEINZ. Do you know in what instance?

Mr. KAPLAN. I don't offhand. We can certainly get you that information.

Senator HEINZ. All right.

[The prepared information follows:]

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

6 AUG 1986

Honorable John Heinz
United States Senate
Washington, D.C. 20510

Dear Senator Heinz:

This is in response to the questions you raised during my testimony July 18, 1986, on S. 1655.

The Commerce Department and the International Trade Commission (ITC) must both make certain affirmative findings before there can be a determination of "critical circumstances" that would justify the imposition of retroactive duties. Since the 1979 incorporation of the critical circumstances provision into the Tariff Act, the Department of Commerce has made final affirmative critical circumstances determinations in 19 antidumping (AD) and countervailing duty (CVD) cases. The ITC has found affirmatively on its portion of the critical circumstances determination on only three of these occasions. Thus, the only cases in which retroactive antidumping or countervailing duties have been imposed are these three cases: certain flat-rolled carbon steel products from Brazil (AD)(1984); potassium permanganate from the PRC (AD)(1984); and oil country tubular goods from Spain (AD)(1985).

I also wanted to add certain information about assistance to small business petitioners, which you also raised during my testimony. Import Administration (IA) provides extensive assistance to potential petitioners, whether they be small businesses or not. IA officials often meet with potential petitioners to advise them on necessary procedures, and explain the information that must be presented in a petition for us to consider it an adequate one. In addition, IA personnel will develop certain relevant information for companies or refer them to other governmental offices for additional information or assistance. In unusual cases, IA personnel have traveled to petitioners' premises in order to better advise them. Attachment 1 is a partial listing of recent cases in which IA has provided significant assistance to small business petitioners.

In addition, the Trade and Tariff Act of 1984 established a Trade Remedy Assistance Office in the ITC specifically to provide assistance to small businesses. This office is designed to educate small businesses about the legal remedies available to them and to help small businesses prepare the appropriate petitions.

IA's efforts to assist small businesses have been very successful. We calculate that at least twenty-six antidumping and countervailing duty cases have been brought by small businesses. (See attachment 2). This list of small business cases would grow considerably if we include those cases that have been brought by small businesses that form trade associations in order to share the cost of pursuing their cases. For example, the Floral Trade Council, which consists of ninety-two U.S. flower growers and nurseries, has recently brought nine countervailing duty and eight antidumping duty cases on flowers from various countries.

Please contact me if I can be of any further assistance.

Sincerely,

Gilbert B. Kaplan
Deputy Assistant Secretary
for Import Administration

Attachments

Attachment 1.

APRIL 1986

IMPORT ADMINISTRATION
OFFICE OF INVESTIGATIONS

SMALL BUSINESS PETITIONER CONTACTS WITHOUT LEGAL REPRESENTATION
1985/86*

A. AD INQUIRIES

PRODUCT	CO. NAME	DOC VISIT	MAIL/PHONE CONTACT	HAS PETITION BEEN FILED
1. Patio Tables	Marsh Allen Co/OH.	No	Yes	No
2. Pistachios	Assoc./CA.	Yes	Yes	Yes
3. Thermostats	Triplex Inter Control Co./VT.	No	Yes	No
4. Valves/ Strainers	Jameco Ind. N.Y.	Yes	Yes	No
5. Clock Mechanisms	Cong. Call/ WISC.	No	Yes	No
6. Sardines	Port Clyde Foods/ME.	Yes	No	No
7. Machine Tools	Simmons Machine Tool Co./N.Y.	No	Yes	No
8. Steel Products	Keller Steel Co./ILL.	No	Yes	No
9. Ski Poles	Reliable Racing Supply Co.	No	Yes	No
10. High Temparature Teflon Wire	Sonic Wire Co./CA	No	Yes	No
11. Conveyor Belting	Hardin Cook Co./ CA.	No	Yes	No

*Includes cases brought by group or association of small businesses.

AD INQUIRIES CON'T.

PRODUCT	CO. NAME	DOC VISIT	MAIL/PHONE CONTACT	HAS PETITION BEEN FILED
12. Pigments	Wayne Chemical Corp./WISC.	No	Yes	No
13. Wheat	Cong. Ofc./ N.D.	No	Yes	No
14. Steel Mesh Products	Pfifer Corp./AL.	No	Yes	No
15. 64K DRAMs	Micron Technology Inc./ID.	Yes	Yes	Yes
16. Chemicals	Agrico Chemical Co./OKLA.	No	Yes	No
17. Front End Loaders	Melroe Co./N.D.	Yes	Yes	No
18. Uranium	Assoc./ D.C.	Yes	No	No
19. Steel Fencing	Oklahoma Steel & Wire Co./OKLA.	No	Yes	No
20. Plastic Loose Leaf Binder Sheets	Formflex/ IND.	No	Yes	No
21. Electro-deposited Foil	Materials Technology Inc./N.J.	No	Yes	No
22. Oars	Caviness Woodworking/ MI.	No	Yes	No

AD INQUIRIES CON'T.

PRODUCT	CO. NAME	DOC VISIT	MAIL/PHONE CONTACT	HAS PETITION BEEN FILED
23. Tubular Steel Fixtures	Lozier Corp/NB.	No	Yes	No
24. Operators for Jalousie Windows	Caribbean Die Casting Corp./Anderson Corp./P.R.	Yes	Yes	Yes
25. Photo Albums & Filler Pages	Assoc.	Yes	Yes	Yes

B. CVD INQUIRIES

PRODUCT	CO. NAME	DOC VISIT	MAIL/PHONE CONTACT	HAS PETITION BEEN FILED
1. Chocolate Manufacturers	Chocolate Manu. Assoc.	No	Yes	No
2. Recycled Paperboard	American Paper Inst., Inc.	Yes	Yes	No
3. Candy and Sugar Decorations for Confectionary Products	Raymond Foods, Inc.	Yes	Yes	No
4. Operators for Jalousie Windows	Caribbean Die Casting Corp. and The Anderson Corp./P.R.	Yes	Yes	Yes
5. Kiwi Fruit	Assoc.	No	Yes	No
6. Dried Flowers	Natures Harvest Co.	No	Yes	No
7. Japanese Electronic Speedometers	Avocet, Inc., Menlo,/CA.	No	Yes	No

Attachment 2.

AD/CVD CASES BROUGHT BY SMALL BUSINESSES 1/1/80 THROUGH 7/25/86*

I. ANTIDUMPING

Product	Prelim. ITC	DOC Prelim.	DOC Final	Final ITC	Suspension	Comments
10/17/80 Portable Electric Nibblers (Swiss)	Neg. 12/3/80					
12/10/80 Latchet Hook Rug Kits (UK)	Dismissed					ITC Determination that Petitioner not a producer under Act
12/12/80 Certain Iron Metal Castings (India)	Aff. 1/14/81	Neg. 5/27/81	Neg. 8/5/81			
4/27/81 Tubeless Tire Valves (FRG)	Aff. 6/3/81	Neg. 9/23/81	Neg. 11/30/81			
9/8/81 Fireplace Mesh (Taiwan)	Aff. 9/24/81	Aff. 1/22/82	Aff. 4/9/82	Aff. 5/21/82		0-6.4% Duty
2/9/83 Fall Harvested Round White Potatoes (Canada)	Aff. 9/28/83	Aff. 8/2/83	Aff. 11/10/83	Neg.		
8/30/83 Spindle Belting (FRG)	Neg. 9/28/83					
8/30/83 Spindle Belting (Italy)	Neg. 9/28/83					

*List does not include cases brought by group or association of small businesses.

AD/CVD CASES BROUGHT BY SMALL BUSINESSES 1/1/80 THROUGH 7/25/86
-continued-

AD - continued

Product	Prelim. ITC	DOC Prelim.	DOC Final	Final ITC	Suspension	Comments
8/30/83 Spindle Belting (Japan)	Neg. 9/28/83					
8/30/83 Spindle Belting (Swiss)	Neg. 9/28/83					
11/25/83 Felt Instrument Key Pads (Italy)	Aff. 12/21/83	Aff. 4/25/84	Aff. 7/11/84	Aff. 8/29/84		1.03-1.16% Duty
7/15/85 64K DRAMs (Japan)	Aff. 8/8/85	Aff. 12/2/85	Aff. 4/23/86	Aff. 6/6/86		11.87-35.34% Duty
4/8/86 Jalousie and Awning Windows (El Salvador)	Aff. 5/5/86					

II. COUNTERVAILING DUTY

3/10/80 Certain Metal Castings (India)	Aff. 4/4/80	Aff. 5/20/80	Aff. 8/19/80	Aff. 9/29/80		12.9-16.8% Subsidy
8/25/80 Plastic I.D. Tags (New Zealand)	Aff. 9/15/80	Aff. 10/28/80	Aff. 1/8/81	Neg. 2/24/81		
11/5/80 Leather Wearing Apparel (Argentina)	N/A	Aff. 1/9/81	Aff. 4/20/81	N/A	3/13/81	4.86% Subsidy

AD/CVD CASES BROUGHT BY SMALL BUSINESSES 1/1/80 THROUGH 7/25/86
-continued-

CVD - continued

Product	Prelim. ITC	DOC Prelim.	DOC Final	Final ITC	Suspension	Comments
11/5/80 Leather Wearing Apparel (Colombia)	Aff. 1/9/81	Aff. 1/15/81			4/2/81	
11/5/80 Leather Wearing Apparel (Mexico)	N/A	Aff. 1/9/81	Aff. 4/7/81	N/A		5% Subsidy
11/5/80 Leather Wearing Apparel (Uruguay)	Aff. 12/1/80	Aff. 12/12/80	Aff. 3/30/81	Aff. 5/22/81	3/16/81 which was subsequently terminated and order reinstated	17.26% Subsidy
11/23/81 Hard Smoked Herring Filets (Canada)	Neg. 1/23/81					
7/20/82 Pectin (Mexico)	N/A	Aff. 9/23/82			Respondent Renounced Subsidy 12/7/82	11-19% Subsidy
8/1/82 Fireplace Mesh (Taiwan)	Aff. 9/15/82	Neg. 12/23/82	Neg. 3/17/83			
9/30/82 Certain Iron Castings (Mexico)	N/A	Aff. 12/6/82	Aff. 3/17/83	N/A		2.85% Subsidy

AD/CVD CASES BROUGHT BY SMALL BUSINESSES 1/1/80 THROUGH 7/25/86
-continued-

CVD - continued

Product	Prelim. ITC	DOC Prelim.	DOC Final	Final ITC	Suspension	Comments
11/30/82 Asparagus (Mexico)	N/A	Neg. 3/2/83	Neg. 5/13/83			
11/25/83 Felt Instrument Key Pads (Italy)	Aff.	Neg. /7/84	Neg. 4/25/84			
4/8/86 Jalousie and Awning Windows (El Salvador)	Aff. 5/5/86	Aff. 6/12/86				

Senator HEINZ. Let me ask the second question. We have a lot of witnesses today. And it is this: It is not new to have the administration say that whatever proposal is before the committee or subcommittee is GATT illegal. I think you have said that about every single provision in the Senate trade bill. You probably have said it twice about every provision in the House bill. And you say flatly that the Specter proposal is inconsistent with the GATT, and you cite various chapters and segments of the GATT.

Yet, as Senator Specter said, there are a number of experienced, prominent trade attorneys who have argued in detail—and I am not an attorney, so I don't need to argue in detail—that it is consistent—[laughter]—on the theory that the GATT sets limits only on governmental actions, not on private actions. Now, there is certainly logic to that position. How can the GATT have prescribed a practice as unfair, that is, to be condemned, taking the language and the words of article 6, and yet not allow a private party to get compensation from an unfair practice? I don't want to get into deep legalities. I am talking about whether or not, before a GATT panel, you can make a logical argument because, ultimately, it is not what you say or I say that makes something GATT legal; it is how somebody interprets the intent of the GATT.

You know, you read through the GATT, and one thing that is clear is that it sure covers a lot of ambiguity in a spectacular way. So, it is going to be a judgment call.

My question is, therefore, isn't there a logical argument there?

Mr. HOLMER. Every trade issue that comes before the committee is going to be somewhere on a spectrum in terms of what degree of ambiguity there is on GATT legality. On natural resources, there is a fair degree of ambiguity based on the written letter of the GATT and the subsidies code. With respect to this proposal, there is substantially less ambiguity. If this were enacted, would the U.S. representatives do their best to make the most logical argument possible before the GATT panel? Absolutely.

Senator HEINZ. How would you do that? [Laughter.]

Mr. HOLMER. With some difficulty, Mr. Chairman. [Laughter.]

Senator HEINZ. Don't undercut your case that is imprudent. What would you argue? Let's assume we pass some version of this. Wouldn't you argue——

Mr. HOLMER. There are a number of hurdles which at least in the bill in its present form would be insurmountable, I think. I don't see how——

Senator HEINZ. No, no.

Mr. HOLMER. But I am confident, Mr. Chairman, that you will fix those provisions. [Laughter.]

The parts of it that are——

Senator HEINZ. Let's strip it down to its bare essentials, which is a private right of action seeking some kind of compensation for injury. Let's just forget the bill; let's just argue the principle in front of a GATT panel. And the Congress has passed legislation that includes the principle of a private right of action where the injured party gets compensation. Now, how do you argue that, with the best chance of winning it?

Mr. HOLMER. In order to argue it with the best chance of winning, it is going to be necessary, as I indicated to Chairman Dan-

forth before he left, for there to be a singling out by the Congress of some characteristic in design a private right of action that goes beyond just saying if there is dumping, we condemn it and we are going to be able to enjoin the import of that product into the United States.

There has to be some mechanism for being able to create a cause of action—as some on the staff here have attempted to do through the antitrust law—that takes it out of the realm of the normal dumping statute. The second thing that we have to have is some kind of provision that preserves under article 3 of the GATT a justification that this treats foreign firms and their products on an equal footing with U.S. firms and their products. And if there is a way to get over both of those two hurdles, and make it a damage remedy as opposed to injunctive relief barring the importation of the product, I would think we would have a far, far better chance of being able to prevail in the GATT.

Senator HEINZ. What is wrong with injunctive relief?

Mr. HOLMER. The problem with injunctive relief is that essentially it is an embargo that is going to keep that product from entering the United States. Article 11 of the GATT does have prohibitions against embargoes or other quantitative restrictions, unless there are certain exceptions which it seems to me would not be satisfied under these circumstances.

Senator HEINZ. Suppose it was just a preliminary antidumping duty imposed injunctively?

Mr. HOLMER. You mean by the United States?

Senator HEINZ. Yes, by a court.

Mr. HOLMER. In response to dumping?

Senator HEINZ. Yes.

Mr. HOLMER. I would think it would probably be possible to craft such a remedy if it was just offsetting duties consistent with the GATT——

Senator HEINZ. Putting a duty on is not an embargo.

Mr. HOLMER. That is true; and what the framers of the GATT and the dumping code have permitted as the sole remedy for dumping, as an exception from the normal rules, is to permit offsetting duties to be imposed, up to the margin of dumping.

Senator HEINZ. What would happen if we simply made the Robinson-Patman Act applicable to foreigners? Would that solve your problem? Is that applicable to U.S. persons?

Mr. HOLMER. That, I believe, preliminarily would solve the GATT problems. Whether it would solve the antitrust problems that the Justice Department might have or whether that would be good overall policy, I am not enough of an antitrust expert to be able to give you a coherent opinion.

Senator HEINZ. You are doing pretty well, Mr. Holmer. Thank you very much.

Mr. HOLMER. Thank you, Mr. Chairman.

Senator HEINZ. I have taken too much of my colleagues' time. Gentlemen, thank you very much.

Mr. KAPLAN. Thank you.

Senator HEINZ. Our next panel consists of Barton Green, Bill Knoell, Alan Wolff, and Carl Edquist, who will be replacing Richard Carr. He was to testify on panel 3 originally.

Gentlemen, please take your seats. Mr. Green, you are going to be our first witness. You are representing the American Iron and Steel Institute. Please proceed.

STATEMENT OF BARTON C. GREEN, GENERAL COUNSEL, AMERICAN IRON AND STEEL INSTITUTE, WASHINGTON, DC

Mr. GREEN. Thank you, Senator Heinz. Mr. Chairman, I am Barton Green. I am general counsel of the American Iron and Steel Institute. I am accompanied this morning, on my left, by Peter Koenig, who is an attorney for USX Corp., formerly United States Steel, and on his left, by Laird Patterson, who is counsel for Bethlehem Steel Corp. The steel industry has, for almost a decade, supported the creation of a private remedy for dumping, such as would be proposed by the Specter bill.

The Senate has held a number of hearings over the years on predecessor bills. The chairman of this subcommittee, Senator Danforth, himself introduced a bill in 1979 on which there was a hearing held in 1980. The trade bill recently passed by the House, H.R. 4800, contains a private dumping remedy similar in many respects to S. 1655. Thus, this is not a new idea. It has been considered by the Congress for many years, and it is an idea whose time has come.

The steel industry knows from its own experience with hundreds of cases over almost a decade that the existing dumping laws do not deter dumping nor do they provide an adequate remedy for dumping when it occurs. The administrative remedy, with only a minor exception, the little used critical circumstances provision, provides prospective relief only, namely on entries of merchandise after a finding that dumping is occurring and causing injury. The form of relief is antidumping duties on subsequent entries.

Dumpers can easily avoid paying duties by adjusting their prices or switching to other products. It is standard commercial conduct. Even in those cases where antidumping duties are collected, they go into the U.S. Treasury, not to the injured domestic industry. The private relief provisions of the 1916 Antidumping Act are so draconian and ineffective that relief has never been provided under that statute.

A new remedy for dumping is urgently needed. It must be a remedy that will deter dumping. In order to do this, it must create a realistic possibility of an actual penalty for conduct that violates the statute. I hasten to add that the interest of the steel industry is not the collection of large amounts of damages pursuant to a private remedy. Our primary interest is in a statute that deters dumping. Nothing would make us happier than having a statute that would so effectively deal with the pernicious commercial practice of dumping that it was not necessary to file either an administrative dumping case or a private action for damages.

A private civil remedy for dumping is the best way, in my view, to deal with the current inadequacy of the administrative dumping remedy. The Specter bill would do this by decriminalizing and detreblizing the 1916 act.

Stepping back for a minute to look at what dumping actually is, it is usually characterized as injurious international price discrimi-

nation. It is actionable conduct under longstanding United States and international law. It is essentially a commercial tort committed by one private party against another. Therefore, a private remedy in Federal court is entirely appropriate. Federal courts are fully competent to deal with dumping. They regularly deal with complex antitrust and contract cases that involve issues similar to dumping and injury from it.

The steel industry is being seriously injured by dumping. The American Iron and Steel Institute urges the Senate to pass an effective remedy for dumping. We commend Senator Specter for his leadership with S. 1655.

Mr. Chairman, if I have a minute, I would like to respond to a couple of questions that were raised in the hearing thus far.

Senator HEINZ. Hurry up.

Mr. GREEN. All right. First of all, there is a question of a meeting competition defense and whether it would be appropriate in a private remedy. My answer is "No." Dumping is international price discrimination. It is effective only from a protected home market. There cannot be, by definition, a protected home enclave within the broad U.S. market. Therefore, what is appropriate with the Robinson-Patman Act, namely a meeting competition defense, is not appropriate where there is the possibility of a foreign seller operating behind a protected home market.

Senator HEINZ. I will have a question I will address to you on that.

Mr. GREEN. May I comment on the GATT point?

Senator HEINZ. Let's come back to that. I have got to be fairly strict on time here because this hearing has to end at 11:30 a.m., and we have two more panels that we would like to get to.

Mr. GREEN. All right.

Senator HEINZ. Bill Knoell?

[The prepared written statement and a letter of Mr. Green follows:]

STATEMENT OF

BARTON C. GREEN

ON BEHALF OF THE

AMERICAN IRON AND STEEL INSTITUTE

BEFORE THE

SUBCOMMITTEE ON TRADE

OF THE

COMMITTEE ON FINANCE

OF THE

UNITED STATES SENATE

IN SUPPORT OF

S. 1655

JULY 18, 1986

Good morning. I am Barton C. Green, General Counsel and Secretary of the American Iron and Steel Institute.

AISI is the principal trade association of the domestic steel industry. Its members account for about 80 percent of domestic raw steel production.

The bill before the committee today, S. 1655, would create a private remedy for dumping, which is injurious international price discrimination. S. 1655 is the most current embodiment in the Senate of a legislative proposal that has been under consideration by the Congress for almost a decade and that has been consistently supported by the steel industry. Steel industry witnesses testified in 1979 and 1982 in support of predecessor proposals to amend the 1916 Antidumping Act. In May 1983, Thomas C. Graham, now Chairman of AISI, testified on behalf of AISI in support of S. 418, the predecessor of S. 1655 in the 98th Congress.

Once again, we welcome the opportunity to express the steel industry's strong support for legislation to provide a meaningful private remedy for dumping.

Mr. Chairman, the steel industry has invested more time and effort in the pursuit of administrative remedies under the antidumping and countervailingduty laws than any other industry in the United States. No industry is better positioned to testify that aggressive - and costly - pursuit of remedies under those laws provides an inadequate deterrent to other countries that would engage in unfair trading in our markets, not to mention an inadequate remedy to injured domestic industries.

The increasingly sophisticated nature of dumping practices by foreign companies and their agents make the 1916 Act, with the proposed amendments, an important alternative means of deterring dumping or obtaining some realistic relief when it occurs. For example, the existing antidumping and countervailing duty remedies have not proved capable of dealing with situations where there is a sudden influx of dumped imports or where foreign dumpers build their initial base in the U.S. market before antidumping duties can be imposed. Current law has not been successful in combating "dump and run" tactics or where U.S. subsidiaries of exporters inventory dumped merchandise in the U.S. market. In each of these situations, the present trade laws do not provide an effective deterrent or remedy and S. 1655 would amend the 1916 Act to create a useful tool.

One clear reason for the recurring frustration of our efforts is that under the present Antidumping Act dumping is risk-free, since the relief is entirely prospective. If an exporter engages in dumping to a sufficient degree to induce a domestic producer to undertake the significant cost of complex administrative proceedings, the only consequence is the imposition of duties on future imports. Those duties, incidentally, are frequently not imposed, because of price adjustments, and when imposed go to the Treasury not to the injured domestic companies. S. 1655 would deal with a major gap in our laws by attaching a meaningful economic risk to a decision to dump in the U.S. market.

I would like to take a minute to comment on the appropriateness of a private remedy, sought in federal court. Since the act of dumping is essentially a commercial tort, perpetrated by one private party against another private party, it is entirely appropriate for relief to be sought by the injured party and for that relief to be sought in federal court. Courts deal regularly with legal and factual situations far more complicated than price discrimination and the injury caused by it. Further, the fact that there is an administrative remedy to obtain prospective relief does not in any way make it inappropriate for there to be a private remedy for relief from past injury. Indeed, the proposed private dumping remedy would complement the administrative remedy.

I would also like to touch on the compatibility of S. 1655 with the President's Steel Program, announced in September of 1984 as a substitute for relief under existing trade laws. Pursuant to that Program, the Administration has negotiated a series of bilateral export restraint arrangements with major steel exporting nations. This Program is intended to provide a period of temporary relief from the injury resulting from the disruptive and unfair trade practices of the major steel exporting nations. It covers steel mill product exports shipped prior to October 1, 1989. Given the record of our trading "partners", there is no reason to doubt that the expiration of the Program will result in a wholesale resumption of aggressive, unfair trade practices by steel exporters that are presently subject to restraint under the program. Accordingly, the steel industry must use the period of the President's Program not only to enhance its international competitiveness but also to urge the enactment of more effective remedies to address unfair trade practices. S. 1655 would provide such a remedy.

As a final point, we commend the sponsors of S. 1655 for proposing the availability of private suits with respect to injury from customs violations. We are deeply concerned about the potential undermining of the President's Program through customs fraud and evasion. Our concern was confirmed in the following findings of an April 1985 Report on Unfair Foreign Trade Practices by the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce:

> "United States steel companies, workers and communities have been seriously damaged by foreign producers willing to sell steel in the U.S. at prices below those charged in their home markets, and in many cases, even below their own manufacturing cost. U. S. Government agencies in two administrations have been notably ineffective in enforcing trade laws designed to prevent these predatory practices. As the result of Congressional pressure and enhanced Customs enforcement in recent years, some of the criminal activities associated with unfair practices have been prosecuted. Mitsui and Marubeni, large Japanese trading firms, Thyssen, the largest German steel producer, and Daewoo, a huge South Korean trading conglomerate, have all pleaded guilty to numerous criminal schemes designed to falsely inflate the price of imported steel reported to Customs, and thereby avoid triggering antidumping investigations."

> "The commercial incentives to evade tariffs and quotas still exist and the new steel agreements negotiated last fall and winter stand in danger of being subverted. The record raises serious doubts about the ability of the U.S. Customs Service to effectively enforce the new agreements and discourage the pattern of the fraudulent behavior exhibited over the past seven years. These concerns should not be interpreted as a minimization of the considerable efforts of the Customs Service to investigate and prosecute steel fraud over the past two years. Rather, the concerns reflect the sober realization that Customs lacks the resources necessary to enforce these broad new agreements, and at the same time, carry out all its other important duties."

These findings, and the fact that there are indications of transshipment through third countries not covered by arrangements under the President's Program, indicate that the enactment of the custom fraud provision of S. 1655 would add significant and obviously needed legal remedies to those available to domestic industries in the war against customs fraud.

S. 1655 poses a straightforward question: Are we really serious about our unfair trade laws? If we are, it makes eminently good sense to permit domestic industries that are being injured by proscribed practices to recover their damages from the source of the injury. It also makes eminently good sense to enact a statute that will force our trading partners to factor meaningful financial risk into their decisions to engage in predatory market conduct at the expense of United States jobs, taxes and national security.

Mr. Chairman, our international trade deficit is a cause for alarm and a reason for urgent corrective action. S. 1655 represents a worthwhile step toward attacking that portion of the trade deficit accounted for by imports benefitting from unfair conduct that violates both U.S. law and international agreements. We enthusiastically endorse this bill and look forward to working with its sponsors to encourage its enactment into law.

Thank you for the opportunity to appear before you. I will be pleased to respond to questions.

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American Iron and Steel Institute

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Barton C. Green
General Counsel
and Secretary
(202) 452-7143

July 31, 1986

The Hon. John C. Danforth
United States Senate
Washington, D. C. 20510

Re: S. 1655

Dear Senator Danforth:

I appreciated the opportunity to testify before the Senate Finance Subcommittee on International Trade on behalf of the American Iron and Steel Institute on July 18.

I would appreciate it if you would permit me to submit for the record this letter, in which I briefly comment on certain matters that arose during the course of the hearing:

1. What is at issue in S. 1655 is not whether normal price competition is desirable but rather whether unfair, injurious, international price discrimination (dumping) should be dealt with by creating a new private damages remedy that will have some chance of deterring it.

2. Dumping has for decades been branded as unfair and actionable misconduct under both international and domestic law. Thus, there is a well understood, world-wide consensus that dumping is undesirable and should be stopped, notwithstanding that it may in the short term offer lower prices to some purchasers. In the long run, dumping harms the economy and renders it less efficient.

3. The current dumping laws are ineffective. The existing private damages remedy, 1916 Antidumping Act, has never been successfully used, because it requires plaintiffs to prove specific intent to injure and its penalties are severe (treble damages and criminal sanctions). The administrative remedy, the 1921 Antidumping Act and its current successor in the Tariff Act of 1930, as amended, also has not been successful either in deterring dumping or in providing an effective remedy once it occurs. The administrative antidumping remedy is costly, lengthy, uncertain and prospective only. Any duties collected go not to the injured domestic industry but to the U. S. Treasury.

4. S. 1655 does not violate U. S. obligations under the GATT. First, under U. S. law, the GATT is an executive agreement that has never been ratified by the Congress, and thus U. S. statutes take precedence over the GATT. Second, the 1916 Antidumping Act is grandfathered under the subsequently-adopted GATT. It would not lose that status as a result of the amendments to it that would be made by S. 1655, because those amendments make the 1916 Act less burdensome on foreign dumpers by decriminalizing the offense and detreblizing damages obtainable. Third, regardless of grandfathering, GATT Article 19 deals only with remedies that national governments may impose with respect to dumping and does not purport to deal with private remedies for commercial torts. Even if one accepts the argument that the requirement of national treatment applies to a judicial remedy for commercial misconduct on the part of one private party that injures another private party, national treatment is accorded by virtue of the fact that the 1916 Act, as amended by S. 1655, would apply on an equal basis to dumping in the United States by parties of both U. S. and foreign nationality. For example, a U.S. corporation that established a foreign manufacturing facility and dumped into the U.S. market would be subject to S. 1655 remedies notwithstanding its U.S. nationality.

5. The Robinson-Patman Act, even if amended, would not be a satisfactory alternative to S. 1655. The Robinson-Patman Act was created largely to deal with price discrimination of a type different than dumping: domestic price discrimination between classes of customers. A typical Robinson-Patman target would be a grocery wholesaler that price discriminated against a corner grocery store in favor of a major chain to an extent not justified by cost savings in serving the chain. A crucial distinguishing characteristic of dumping, which precludes there being analogous conduct within the U. S. market, is the fact that dumping can occur over any substantial period of time only from a protected home market. If the home market is not protected, dumped merchandise will eventually find its way back to the home country and erode the higher home market price. Dumping, in effect, is marginal cost pricing of a portion of a manufacturer's output that makes economic sense to the manufacturer only if the selling price on the balance of the output is not eroded. Where the home market is protected, the below average total cost foreign sales can make a contribution to fixed costs without undermining home market price levels. Thus, by tolerating dumping we are tolerating protected foreign markets.

6. A so-called meeting competition defense would be an inappropriate addition to S. 1655. First of all, under long-standing international and domestic law, injurious dumping is considered misconduct, whether or not the dumped price merely meets a competitor's price. Second, the competitor's price is frequently substantially suppressed by the dumping itself. Third, the offense of dumping requires not only proof of price discrimination but also proof of injury, and given the fact that proving injury is very difficult where the dumped price merely meets a competitor's price a de facto meeting competition defense is already part of dumping law. Fourth, for reasons noted above, the analogy between price discrimination under the Robinson-Patman Act, with its meeting competition defense, and improper dumping from a protected home market is inappropriate, and the policy reasons that can be used to justify the appropriateness of such a defense under Robinson-Patman do not apply to dumping.

7. Federal courts are fully competent to deal with the issues involved in a private dumping action. Similar issues are dealt with regularly by such courts in antitrust, breach of contract and other cases.

8. A multiple offender trigger to a private dumping remedy is undesirable. It would lengthen the time required to obtain a private remedy, with additional harm to the domestic industry. Moreover, dumpers would use this as a way to avoid potential liability by switching to other products or acting through multiple corporate entities, depending on how the trigger was established.

9. It is not appropriate for a private dumping remedy, which is essentially a remedy for a commercial tort, to be recast as a traditional antitrust remedy, with a requirement of intentional misconduct and injury to competition as such.

10. The possibility of mirror legislation should not deter Congress from enacting a much-needed private remedy for dumping. If a U. S. private dumping remedy is properly crafted, U. S. exporters that adhere to international standards of commercial conduct will have nothing to fear. On the other hand, if U. S. exporters dump and cause injury, there is no reason why they should not be held accountable.

11. The assertion by an Administration witness that the "present dumping law does work" is patently incorrect. Dumping has for many years occurred, and continues to occur, on a large scale, notwithstanding massive and enormously costly efforts to obtain redress under present law. It is not surprising that the Administration witness in question, who is the official directly charged with administering the current antidumping law, was unable to cite a single instance in which the Administration had enforced the "critical circumstances" provision that permits retroactive provisional remedies where surges of imports have occurred. The cold, hard fact is that the present law was not designed to deal with, and is in fact not capable of dealing with, sophisticated dumping on a large scale. Giant and sophisticated foreign corporations are dumping merchandise into the U.S. market on a massive scale. U. S. commercial and legal advisors provide them with expert market intelligence and legal advice on how to evade penalties under current law. No other market in the world is as open as that of the United States. No other national government would tolerate recognized injurious commercial misconduct on a massive scale over an extended period of time the way successive U.S. administrations have done. It is little wonder that American corporations, weakened by years of unfair foreign competition, which includes massive foreign government subsidization as well as dumping, have trouble being internationally competitive.

12. Domestic industries injured by dumping will be quite willing to endure the time required for discovery and trial under S. 1655 that was cited as a "major impracticality" by an Administration witness. First of all, if the new law is effective, it will deter dumping and private suits will not be

necessary. Second, if dumping does occur, an effective remedy, even if lengthy, is better than no remedy at all, which is substantially the present situation.

In summary, the American Iron and Steel Institute strongly supports the enactment of a private dumping remedy. S. 1655 is sponsored by Senator Specter and cosponsored by virtually the entire leadership of the Senate. A similar remedy, sponsored by Congressman Guarini, is contained in the trade bill recently passed by the House, H.R. 4800. Thus, the idea of a new private dumping remedy, to replace the present ineffective and unused one, is not something thought up by wild-eyed protectionists but is a thoughtful proposal for dealing with a serious problem. This is not to say that there are no changes in S. 1655 that would be appropriate, and the American Iron and Steel Institute also supports the private dumping remedy provision in H.R. 4800 and the private dumping remedy proposed by the Trade Reform Action Coalition, of which AISI is a member.

An effective private remedy for injurious dumping is a critically needed addition to U. S. trade law. We urge you and your colleagues to support such a remedy.

Thank you for permitting me to submit this supplemental statement for the record. AISI would be pleased to work with Subcommittee members and staff in any way that might be desired.

Sincerely,

Barton C. Green

cc: Members of Senate Finance Committee
Hon. Arlen Specter

STATEMENT OF WILLIAM H. KNOELL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CYCLOPS CORP., PITTSBURGH, PA; AND MEMBER, ADVISORY COMMITTEE, SPECIALTY STEEL INDUSTRY OF THE UNITED STATES

Mr. KNOELL. Thank you, Senator Heinz. I am here on behalf of the specialty industry. You have the statement representing 14 producers; so I want to depart from that and give you some of my own comments.

My experience in this trade area goes back to when Bill Everley was the USTR, and we now have Ambassador Yeutter; and he is the sixth that I have dealt with over a period of time that I have been trying to deal with the specialty steel trade problems. That isn't solving the problems, but that is not to be discussed here today.

This is the fourth time in the past decade that I have testified on the right of private action on unfair trade. In the intervening years in the specialty steel industry, we have been involved in a lot of unfair trade cases. We have won two escape clauses. We have won a number of dumping and countervailing duty cases. As a matter of fact, we have been the supposed beneficiaries of things like the Solomon report, the tripartite committee, trigger price mechanisms, surge mechanisms, EEC arrangements and voluntary restraints.

You would think with all those victories, if we had an effective trade procedure, our problems would be behind us, but we are not. You know, still imports have been running at record levels. You have to look at the trade deficit we are running or yesterday's headlines, as you pointed out in your opening remarks. Let me just take one area of specialty steel: Stainless sheet strip, perhaps our most important product.

In the first 3 months of this year, imports from the EEC were 38,000 tons, or more than 15 percent of the market. That is three times what they were in the first quarter of last year. Our unfair trade problems are with us.

Let me examine with you what I think are some of the problems. First, as has been pointed out, engaging in unfair trade in the United States is riskless. We in industry are forced to go through massive preparation of cases on a country by country, product-by-product basis; and then, when we win a decision, very little happens. First, the duties imposed are only prospective, and our Government gets some assurance that they are going to cease and desist, and the duties are not imposed. Dumping in the United States is a no-lose proposition.

The foreign country or company reaps the benefit of the sales for whatever their own intents may be, political or social. Should they be prosecuted and found guilty, the worst that happens is they are told to stop. I don't think it is any wonder that our laws haven't been effective on that basis. There is no prophylactic effect. As a result, our Government has had to concoct all those schemes for steel that I just ran through. The legislation that you are considering, that is a private right of enforcement, is certainly a move in the right direction. If there were a threat of being subject to damages, perhaps the companies and governments throughout the

world which have engaged in unfair trade would have had to stop and contemplate these penalties before they poured money into their steel industries.

There would have been some risk involved in making the decisions. As the law now stands, that judgment is easy because there is no risk in proceeding.

Let me go on to another point that I think is of tremendous importance. Our trade laws are political. When an industry such as steel becomes aggressive in pursuing its unfair trade remedies, our trading partners bring tremendous political pressure to bear on the executive branch of our Government. These countries, the ones that we are suing or attacking, are usually our political allies. How long have my peers in the steel industry been pressured to drop our trade actions in exchange for some negotiated solution to the problem? In exchange for promises, we get compromised.

In my judgment, if the enforcement of unfair trade legislation is to be effective, it has to be taken out of the political arena. It must be placed in the judiciary where the facts and the law can speak for itself, letting the chips fall where they may. There will be little incentive for foreign governments to beat up on their U.S. counterparts if the decisions are out of their discretion. It is my personal view that Senator Specter's bill addresses this problem by giving direct access to the courts.

If we have to proceed first through Commerce and ITC, before proceeding to court, in my judgment the added threat at the end of the line of a private action will intensify these political pressures and in the end this legislation could turn out to be counterproductive.

One final point that I would like to make and I will be finished; and that is that, as proposed, it is questionable whether this legislation will deal with subsidies throughout the world, and I think that is a serious mistake because our major trading nations and virtually all the developing nations have in effect rejected the law as compared to the advantage in open competition. Their social and political considerations have replaced economics as the motivation behind their decisions.

Government ownership and subsidization of basic industries has become the rule. The proposed private damage action should include unfair trade as a result of subsidies. I am told there is concern about the idea of sovereign immunity, but I don't understand why this should extend to private companies who receive subsidies or to governments when they are engaging in commercial activities. For years and years, every administration has said that they object to the subsidies. If we want to get them to eliminate them, then let's put some teeth into our actions.

To summarize: Provide a risk to them; second, a private action, so that you take it out of the political area; and third, include subsidies because of their significance.

Thank you.

Senator HEINZ. Your time has expired. Thank you. [Laughter.]

Mr. Wolff.

[The prepared written statement of Mr. Knoell follows:]

Before the
International Trade Subcommittee of the
Senate Committee on Finance

STATEMENT OF

WILLIAM H. KNOELL

SPECIALTY STEEL INDUSTRY OF THE UNITED STATES

Mr. Chairman and Members of the Subcommittee:

I am William H. Knoell, president and chief executive officer of Cyclops Corporation and a member of the Advisory Committee of the Specialty Steel Industry of the United States. I am accompanied by David A. Hartquist and Lauren R. Howard of the law firm, Collier, Shannon, Rill & Scott. The Specialty Steel Industry of the United States believes that the U.S. trade laws do not operate effectively and thus we support efforts to strengthen their provisions. While there are many areas which warrant improvement, our industry would like to take this opportunity to focus on a suggestion which would enhance the efficacy of the dumping statute. We urge the International Trade Subcommittee to approve legislation which would provide a private right of action to enforce the dumping laws of the United States.

I have had a personal interest in a viable damages remedy for a long time. Approximately 10 years ago, I testified before the Trade Subcommittee of the House Ways and Means Committee, urging improvements in the Antidumping Act of 1916. I also presented my industry's views on this matter before the Senate Judiciary Committee in 1982. I firmly believe that such legislation is needed to permit recovery of damages for injury sustained by dumped imports and to provide a more effective deterrent against this unfair trade practice.

Before discussing the merits of a private cause of action to enforce the dumping laws, I would like to describe the industry which I represent here today. The Specialty Steel Industry of the United States is a trade association representing 14 U.S.

producers of specialty steels, including stainless steels, tool and die steels, superalloys and electrical steels. See Attachment 1. Specialty steels are used for applications demanding exceptional hardness, toughness, strength, resistance to corrosion, heat or abrasion, or combinations of these characteristics. Essential to our national defense, they are also required to maintain the civilian economy and a strong industrial base. The domestic specialty steel industry has been found by the U.S. government to be modern, efficient, and technologically superior. Because of its high productivity, American producers are not only able to service the U.S. market but also vigorously seek export opportunities.

However, despite the industry's investment in new facilities and advanced technology, American specialty steel companies have suffered severe injury from imports. Indeed, the U.S. government has acknowledged the industry's plight by granting import relief after two separate escape clause cases, first in 1976 and again in 1983. However, the fact that the industry received relief under section 201 of the Trade Act of 1974 does not mean that such imports were fairly traded. The industry has filed numerous dumping and countervailing duty cases during the past 15 years. As a result of these efforts, foreign producers in the United Kingdom, Brazil and Spain were found to have received unlawful subsidies. In addition, the industry obtained dumping orders against stainless steel wire rod from France, stainless steel plate from Sweden, stainless steel sheet and strip from France, stainless steel sheet and strip from West Germany, and tool steel from West Germany. We have also participated in administrative reviews of these outstanding dumping orders under section 751(a) of the Tariff Act of 1930 and have obtained favorable decisions from the U.S. Court of International Trade.

While we have been successful in these actions, we have only been able to obtain prospective relief. In other words, under the dumping statute administered by the Department of Commerce and the International Trade Commission, the only remedy available is the prospective assessment of special dumping duties. These duties are

remitted to the U.S. Treasury. Thus, no matter how seriously foreign producers have injured domestic companies through their use of this unfair trade practice, American producers are never compensated for our losses. Moreover, aware that the penalty is entirely prospective, foreign suppliers are not deterred from dumping; they know that they need only await the issuance of an administrative order before changing their commercial practices. For these reasons, the Specialty Steel Industry of the United States strongly supports the concept of a private right of action to enforce the dumping laws. Such a remedy would permit U.S. companies to be "made whole" after suffering injury from dumped imports. Moreover, the threat of such damage recovery would also force foreign producers, exporters and importers to be more conscious of their obligations under U.S. and international law when making commercial decisions.

The concept of the private right of action to enforce the dumping laws is not a new one. In fact, the authority for such a remedy has been a part of U.S. law since 1916. Unfortunately, this provision of the Antidumping Act of 1916 is both unenforced and unenforceable. Despite several attempts to utilize this authority, there has never been a successful claim under its provisions. Moreover, the high burden of proof required by the 1916 Act has discouraged attempts to use it. Under the terms of that statute, a plaintiff must prove specific intent to injure or monopolize a U.S. industry. In addition, the onerous penalties -- imprisonment and treble damages -- have also undermined its availability as a remedy.

Because current law is ineffective, we have supported Senator Specter's efforts to create a more viable cause of action. In fact, we are pleased that the Senate Judiciary Committee has approved his bill, S. 1655. However, although we generally agree with his approach, the Specialty Steel Industry of the United States, in coordination with the Trade Reform Action Coalition ("TRAC"), strongly recommends some modifications to this legislation which are endorsed by numerous organizations. Such rev s embody certain accommodations to critics of the "private right" concept,

including those in the Administration, both Houses of Congress, and in the U.S. import community. As Attachment 2 demonstrates, the key features of this amendment place rigorous limitations on the plaintiff in an effort to be fair to the defendant:

- Domestic companies could only file suit after the issuance of a dumping order or the negotiation of a suspension agreement by the Department of Commerce. Moreover, a damages law suit could not be filed until all judicial appeals of the underlying order were exhausted. In this way, litigation would have to await an administrative agency determination that foreign producers were engaging in less-than-fair-value ("LTFV") sales.

- Jurisdiction for such litigation would be placed in the U.S. Court of International Trade, a special court with jurisdiction over international trade matters, in general, and dumping cases, in particular. Thus, there is no question that the court has the expertise to handle such a private right of action.

- Plaintiffs in such litigation would have the following burden of proof: (1) that the particular defendant engaged in less-than-fair-value sales and that such sales caused actual injury to the plaintiff; and (2) if the defendant is an exporter or importer who is unaffiliated with the foreign manufacturer, that such defendant knew or had reason to know he was participating in less-than-fair-value transactions. This knowledge requirement will prevent innocent importers and exporters from incurring liability.

- Unlike existing law, defendants would not be subject to treble damages or imprisonment. Damages would be limited to actual harm incurred during a period beginning three years before the publication of the order or suspension agreement.

- The administrative findings of the Department of Commerce and the International Trade Commission would not be deemed prima facie evidence against the defendant; rather, the administrative records would be admissible as evidence for whatever weight the court wished to give them.

The Specialty Steel Industry of the United States believes that this legislative proposal is a fair, workable solution to this critical trade problem. It will allow U.S. companies that can demonstrate they have suffered injury as a direct result of less-than-fair-value sales to be compensated for that loss. It is also hoped that the existence of the damages remedy will deter foreign producers from engaging in this unfair trade practice. Moreover, plaintiffs will no longer have to prove that there was specific intent to injure or monopolize a U.S. industry -- a high burden of proof which is unnecessary in a statute which no longer contains criminal penalties.

However, I feel compelled to express my own personal views for the record, given my long-standing involvement with this issue. While the proposal supported by my colleagues in the specialty steel industry and TRAC will assist U.S. companies injured by dumped imports, I do not believe the measure goes far enough. Dumping is a practice which violates U.S. and international law. It does so because this practice is not only unfair but also harmful to U.S. companies and their workers. I therefore believe any private right of action should incorporate the following approach:

- Access to court without the prerequisite of either a dumping order or suspension agreement. I believe that, given the opposition of the Administration to this legislation, Commerce will be even more disposed to ruling against domestic industries in the administrative process if they are concerned that foreign producers might have to pay compensation after issuance of an order or negotiation of an agreement. Only the impartial consideration of the judiciary can assure U.S. companies that their dumping case is being evaluated entirely on its merits.

- Elimination of the "exhaustion of judicial appeals" requirement. In light of the "dual track" approach I prefer, there would be no necessity to require the completion of all judicial appeals of an administrative order prior to the commencement of litigation.

- Dumping order as prima facie evidence. However, if an industry chose to first submit its case to the Executive Branch and succeeded in obtaining an order, the court should be required to grant it prima facie weight in its deliberations.

It is my view that the above revisions would strengthen any private right of action enacted into law. However, regardless of whether my personal suggestions are adopted, it is clear that the specialty steel industry's proposal has several advantages over others that are being considered. In reviewing S. 2408, the Antidumping Act of 1986 introduced by Senators Cranston and Baucus, we see several problem areas. First, plaintiffs are only allowed to sue foreign producers and any entities in which they hold "the principal controlling interest." As a result, large international trading companies with no equity interest by foreign producers will not be subject to litigation. Nor will other unrelated importers who are unjustly enriched by buying dumped goods. Given the substantial legal problems of enforcing judgments against foreign producers, it is unclear whether plaintiffs will actually have a viable class of defendants.

But perhaps most significantly, the statute would impose a "Hobson's choice" on domestic industries. Petitioners who filed the original complaint with the Department of Commerce would be required to make an election of remedies within 30 days after the issuance of the dumping order. They would be forced to choose whether they wanted dumping duties imposed according to the terms of title VII of the Tariff Act of 1930 or whether they wished to "preserve the right to seek damages from foreign producers." If they chose the latter course, dumping duties would no longer be imposed on every importer of record subject to the dumping order; rather, such duties would only be assessed against the foreign producer of the article or its affiliates and subsidiaries. Unrelated importers would escape all liability -- both prospective dumping duties and compensation for past injury -- even if the petitioners ultimately failed to win their damages case in court. Thus, we believe that S. 2408 has serious problems which undermine its utility as a damages remedy.

In conclusion, the Specialty Steel Industry of the United States believes that U.S. companies need a viable private right of action to enforce the dumping laws. American manufacturers injured by this unfair trade practice should be able to obtain damages for the harm incurred by dumping. Such legislation would complement traditional dumping laws administered by the Department of Commerce by permitting U.S. manufacturers to recover for <u>past</u> injury. But perhaps most importantly, an effective private remedy would provide a meaningful deterrent to dumping, thereby ensuring that U.S. trade laws are honored. We believe that the legislation we propose today will accomplish these important goals.

ATTACHMENT 1

SPECIALTY STEEL INDUSTRY OF THE UNITED STATES

Allegheny Ludlum Steel Corporation
Pittsburgh, Pennsylvania

Al Tech Specialty Steel Corporation
Dunkirk, New York

Armco Specialty Steels Division
Butler, Pennsylvania

Carpenter Technology Corporation
Reading, Pennsylvania

Columbia Tool Steel Company
Chicago Heights, Illinois

Crucible Specialty Metals Division,
Crucible Materials Corporation
Syracuse, New York

Cytemp Specialty Steel Division,
Cyclops Corporation
Titusville, Pennsylvania

Coshocton Stainless Division,
Cyclops Corporation
Coshocton, Ohio

Jessop Steel Company
Washington, Pennsylvania

Latrobe Steel Company
Latrobe, Pennsylvania

J&L Specialty Products Company
Pittsburgh, Pennsylvania

Slater Steels Corporation
Fort Wayne Specialty Alloy Division
Fort Wayne, Indiana

Teledyne Vasco
Latrobe, Pennsylvania

Washington Steel Corporation
Washington, Pennsylvania

ATTACHMENT 2

6/26/86

SEC. ___. PRIVATE REMEDY FOR INJURY RESULTING FROM DUMPING.

(a) IN GENERAL. -- Subtitle B (19 U.S.C. 1673 et seq.) is amended by inserting after section 739 the following new section:

"SEC. 740. PRIVATE REMEDY FOR INJURY RESULTING FROM DUMPING.

"(a) DEFINITIONS. -- For purposes of this section --

"(1) The term 'court' means the Court of International Trade.

"(2) The term 'eligible party' means a manufacturer, producer or wholesaler of a product in the United States that is a like product to a class or kind of merchandise with respect to which an anti-dumping order was issued under section 736 or a suspension agreement entered into under section 734.

"(3) The term 'affiliate of such manufacturer' includes an exporter or importer if such manufacturer controls, is controlled by, or is under common control with such exporter or importer, with control meaning any legal or beneficial ownership of or voting control over the entity in question.

"(4) Terms used in this section that are defined in title VII of the Tariff Act of 1930, as amended, shall have the respective meanings therein specified.

"(b) CAUSE OF ACTION. -- An eligible party that suffers injury in its business or property by reason of the sale at less than fair value of

imported merchandise of the class or kind referred to in subsection (a)(2) may bring an action for damages in the court against any of the following:

"(1) any manufacturer of the merchandise;

"(2) any exporter of the merchandise to the United States, if the exporter is an affiliate of such manufacturer;

"(3) any importer of the merchandise into the United States, if the importer is an affiliate of such manufacturer; and

"(4) any exporter or importer, who is not an affiliate of such manufacturer, who knew or had reason to know that the merchandise was sold at less than fair value. Any such exporter or importer shall be presumed to have such reason to know if he exported or imported like or similar merchandise from two or more countries subject to orders issued under section 736 or suspension agreements entered into under section 734 within four years from the issuance of the first such order or agreement.

"(c) DAMAGES. --

"(1) IN GENERAL. -- In any action brought under subsection (b), the eligible party, upon a finding of liability on the part of the defendant, is entitled to recover damages for the injury in its business or property sustained by the eligible party, and attorney's fees.

"(2) CALCULATION OF DAMAGES. -- In calculating damages for purposes of this section, the court shall give regard to injury suffered by the eligible party resulting from the sale of merchandise at less than fair value beginning 3 years before the date of the

publication of the order or the notice of the agreement referred to in subsection (a)(2).

"(d) JURISDICTION. -- For purposes of actions brought under this section, the court has jurisdiction over any foreign person that is described in subsection (b).

"(e) SERVICE OF PROCESS. --

"(1) IN GENERAL. -- All process may be served in the district of which the defendant is an inhabitant, or wherever it may be found.

"(2) AGENT. -- The exportation to the United States by a foreign manufacturer or exporter of merchandise shall be deemed to constitute an appointment by such foreign manufacturer or exporter of the District Director of the United States Customs Service for any port through which the article is imported to be the true and lawful agent upon whom may be served process in any action brought under this section.

"(f) ADMISSIBILITY OF ADMINISTRATIVE RECORDS. -- The administrative records of the Department of Commerce and the International Trade Commission in connection with the antidumping proceeding referred to in section (a)(2) shall be admissible as evidence in the action before the court, under protective order where appropriate.

"(g) RULES OF PROCEDURE AND EVIDENCE. -- The Federal Rules of Civil Procedure and the Federal Rules of Evidence shall be applicable to any action brought under this section.

"(h) TIME FOR BRINGING ACTION. --

"(1) IN GENERAL. -- Except as provided in paragraphs (2) and (3), an action may not be brought under this section unless commenced within two years after the date on which an order under section 736 or a notice of agreement under section 734 is published in the Federal Register.

"(2) TOLLING OF LIMITATION. -- The running of the limitations in paragraph (1) shall be suspended while any judicial review of an affirmative determination under subsection (a) or (b) of section 735 is pending.

"(3) EXHAUSTION OF APPEALS. -- An action may not be commenced until more than 30 days after an order under section 736 or a notice of suspension agreement under section 734 is published in the Federal Register. If an action is commenced in the court under section 516(A), no action may be brought under this section until the exhaustion of all appeals.

"(b) CONFORMING AMENDMENT. -- The table of contents for subtitle B is amended by adding at the end thereof the following:

"Sec. 740. Private remedy for injury resulting from dumping.".

STATEMENT OF ALAN W. WOLFF, PARTNER, DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, WASHINGTON, DC; ON BEHALF OF THE SEMICONDUCTOR INDUSTRY ASSOCIATION

Mr. WOLFF. Thank you, Mr. Chairman. My name is Alan Wolff. I am here today representing the Semiconductor Industry Association, which is composed of both producers and consumers of semiconductors. We have a real problem, as Mr. Holmer and Mr. Kaplan and Mac Baldrige and Ambassador Yeutter have suggested. It is a critical problem that is being worked on by them now and has been for the last several months.

Foreign producers are putting U.S. semiconductor producers out of business. Like LTV in chapter 11 yesterday, we lost a major company within the last year—Mostek, a half-billion dollar company in this leading area of technology. Both of these losses, I submit, are very shocking. We need effective relief.

Existing law is clearly inadequate, as has been testified to this morning by the administration, with some prodding from the chairman. Antidumping duties are only a very partial remedy. It is not stopping dumping in semiconductors.

Right now, the Japanese producers have taken some 90 percent of the 64,000 bit memories in DRAMS—about 90 percent of the 256 K DRAMS, the current generation of memory devices, a large portion of erasable, programmable, read-only memories, and a large portion of static random-access memories. This is the core technology area of the semiconductor business in the United States, and it is going and it is going quickly, and it is going due to dumping as well as our being deprived of foreign market access abroad.

Why do they continue dumping, even when dumping duties are threatened? Preliminaries have been found in two of the cases and filed in another. They can take over the market, and then they can raise the prices; and the dumping law is not a remedy.

I would ask you to look at just one part of my written statement and that is the table which follows page 4, which shows what has been happening in electronics starting with color TV's right through the present. Hitachi has seven cases found against it in dumping, Toshiba six, Fujitsu four, Mitsubishi six, Matsushita seven, Oki four, NEC seven—all in electronics—by margins as high as 188 percent. It is, in effect, a crime or transgression that pays; and what we want you to do in this trade bill is make it a form of conduct that no longer pays.

It started in TVs; we have lost that industry. We have lost an important part of the American customer base for semiconductors. Three semiconductor cases have been in process this year, and it hasn't stopped the dumping. What we are asking for is that a fine be imposed on multiple offenders, that if you dump once, you get normal dumping duties; if you dump twice, you get normal dumping duties plus a fine at 50 percent of the value of the goods. If you dump a third time, it is a 100-percent fine of the value of the goods, on top of the regular dumping duties, plus a private right of action of the damages.

I don't believe the GATT is the hurdle that the administration has described it to be. I would like to put in the record just a two-page statement from the multiple aspects of the GATT question.

Under GATT, article 20, there is an exception for taking action necessary to secure compliance with laws and regulations relating to Customs enforcement.

Senator HEINZ. Without objection.

Mr. WOLFF. Thank you.

[The prepared information follows:]

Antidumping - Penalties for Multiple Offenders -- GATT Implications

SIA proposes legislation which would impose fines on manufacturers who are found to have dumped merchandise in a particular product category in the U.S. market on more than one occasion within a ten year period. In the past, opponents of changes in U.S. antidumping laws have contended that the General Agreement on Tariffs and Trade (GATT) precludes the establishment of any remedy for dumping other than the imposition of antidumping duties pursuant to the procedures prescribed in the GATT, as interpreted in the GATT Antidumping Code adopted in 1979. They cite Article 16 of the Code, which states that

> No specific action can be taken against dumping of exports from another Party except in accordance with the provisions of the General Agreement, as interpreted by this Agreement.

While this language may well act as a bar to some new antidumping remedies, it does not appear to preclude the imposition of fines on companies which dump repeatedly.

Article 16 may be read narrowly, as an absolute prohibition against any measure dealing with dumping other than the imposition of antidumping duties pursuant to the detailed procedures set forth in the GATT and the GATT Code. However, a footnote to Article 16 suggests that such a narrow reading would be incorrect. The footnote provides that

> This [Article 16] is not intended to preclude action under other relevant provisions of the General Agreement, as appropriate.

The framers of Article 16 thus explicitly provided that a contracting party can take action against dumping -- apart from that provided in the GATT and the GATT Code -- pursuant to other provisions of the GATT. Consequently, a more plausible interpretation of Article 16 is that it constitutes a prohibition on only those antidumping measures which are not "in accordance with" the provisions of the GATT and GATT Code; other remedies and actions may be adopted to address the problem of dumping pursuant to other sections of the GATT so long as such measures are not themselves inconsistent with the various provisions of the GATT and the GATT Antidumping Code.

In this case, the relevant provision of the GATT is Article XX, which provides, in pertinent part, that

> [N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement. . . .

SIA's multiple offenders provision falls squarely within the scope of Article XX(d). Specifically:

(1) "Necessary to secure compliance with laws or regulations" -- The remedy is being sought in order to deal with companies that flout the U.S. antidumping laws by dumping repeatedly, accepting the payment of duties as a cost of doing business.

(2) "Not inconsistent with the provisions of this Agreement" -- The U.S. would be taking action to secure compliance with the U.S. antidumping laws, which have been drafted to conform to the requirements of the GATT and GATT Code.

(3) "Relating to customs enforcement" -- Dumping is an activity which Congress has determined should be stopped through the imposition of customs duties. Congress has directed the Commerce Department to commence an investigation (whether or not a petition is filed) whenever it determines that dumping is occurring, and to impose antidumping duties in appropriate cases; it has provided for monitoring of imports in cases involving persistent dumping; and it has provided for penalties and fines to be imposed by the federal court responsible for customs enforcement (the Court of International Trade) in certain instances involving attempts to circumvent antidumping enforcement measures (e.g. breach of suspension agreements). Enforcement of the U.S. antidumping laws thus "relates to customs enforcement."

The SIA multiple offenders provision is not really a new antidumping remedy at all, but a measure designed to address repeated violations of existing U.S. antidumping laws. This is precisely the type of measure necessary to ensure customs enforcement contemplated by Article XX, and as the footnote to Article 16 of the GATT Code indicates, such measures should not be precluded by that Article.

Mr. WOLFF. We need extra protection under the laws. The current laws don't work. We hope you pass a trade bill. We hope that it becomes enacted into law this year and that it contains a provision against multiple offenders and a private right of action for damages. Thank you.

Senator HEINZ. Thank you very much. Mr. Edquist?

[The written prepared statement of Mr. Wolff follows:]

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

WASHINGTON, D.C.

Testimony of

ALAN WM. WOLFF

on behalf of the

SEMICONDUCTOR INDUSTRY ASSOCIATION

July 18, 1986

Mr. Chairman, I am Alan Wm. Wolff. I am testifying on behalf of the Semiconductor Industry Association ("SIA") which represents 57 U.S. based producers of semiconductors. I appreciate the opportunity to appear before your Committee to address what is perhaps the most critical trade issue our industry will confront in this decade -- dumping, and the inadequacy of current antidumping remedies to cope with the problem.

To put this issue in perspective, it is perhaps useful to note who will not be testifying before you today. You will not hear testimony from representatives of the U.S.-based television industry. That industry was largely destroyed by dumping in the 1960s and 1970s, and for the most part, no longer exists.

You will not hear from Mostek, historically one of the largest and most innovative U.S. producers of semiconductors, and a company which, as recently as a year ago, employed over 10,000 people. Mostek ceased operations in late 1985, reflecting, in significant part, Japanese dumping of semiconductor memory devices, which were among Mostek's leading products.

I am appearing today on behalf of an industry that is currently fighting to avoid going the way of the television

industry and Mostek. Unfortunately, it is a battle in which we have suffered some significant setbacks already -- during the past five years, major segments of the U.S. semiconductor industry have disappeared, and over 60,000 people in the industry have lost their jobs. U.S. merchant companies have largely withdrawn from the production of dynamic random access memories (DRAMs). U.S. merchants' production of static RAMs (SRAMs) has also largely ceased. The withdrawal of U.S. companies from these product areas is particularly significant because dynamic and static RAMs are "technology driver" products -- companies that make them tend to enhance the competitiveness and lower the costs of all of their other semiconductor products. The erosion we have experienced in these product areas thus has serious long run competitive implications for our industry.

These developments are obviously of critical concern to our member companies, but they should be troubling from a public policy perspective as well. The erosion of the U.S. semiconductor industry which has occurred in the 1980s is not a mere reflection of the operation of the market, or of the loss of competitiveness of a U.S. industry. In fact our industry is not only competitive with Japan, but continues to hold the edge in most product segments. We remain the technological leaders in virtually every area of semi-

conductor technology. We consistently outperform our Japanese competitors, besting them by a wide margin in every major world market outside of Japan itself.

The problem we confront is not one of competitiveness, but of the competitive tactics employed by certain foreign companies. This is perhaps best illustrated by Figure 1, which shows the margins of dumping which have been found against the seven largest Japanese makers of semiconductors since 1970. These companies are all large, diversified producers of electronics products. They possess financial resources which enable them to sell their products below the cost of production in export markets for a sustained period, should they see fit to do so. As Figure 1 shows, they have in fact pursued such a strategy systematically -- in effect, these companies have employed dumping as a standard commercial practice.

This has proven to be a successful strategy. Japanese firms, which systematically dumped televisions in the 1960s and early 1970s, now dominate the television industry. More recently, following a period of intensive dumping -- in some cases at extraordinary margins -- the same companies captured much of the U.S. market for cellular telephones. In 64 K DRAMs, following what Business Week characterized as a "bloodbath," these same companies initially captured 70 percent of the U.S. market and subsequently drove virtually

FIGURE 1

DUMPING IN THE U.S. MARKET BY JAPANESE ELECTRONICS PRODUCERS
(Margins of Dumping)

Case	Hitachi	Toshiba	Fujitsu	Mitsubishi	Matsushita	Oki	NEC
Large Power Transformers (1970)	21.4	51.4					
Black & White TV (1971)	43.4	38.8		81.7	55.2		
Color TV (1971)	58.4	32.3		52.7	74.0		
High Power Amplifier Assembly & Parts (1981) (two types)							25.4 41.4
High Capacity Pagers (1982)					109.1		70.4
Cellular Mobile Phone (1984)	3.0		57.8	87.8	106.6	9.7	95.6
64K DRAM (1985)	11.9	20.8	20.8	13.4	20.8	35.3	22.7
EPROM (1985)[1]	29.9	21.7	145.9	63.1	63.1	63.1	188.0
256K DRAM (1985)[1]	19.8	49.5	74.4	108.7	39.7	39.7	108.7

Margins rounded off to nearest tenth of percent

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[1] Preliminary margin

all U.S. merchant companies out of the market. A Japanese executive, commenting on this episode, candidly stated that

> The Japanese perspective is that when you are still making inroads into a market you can't afford the luxury of making money.[1]

The assessment of antidumping duties has obviously not served as a deterrent to the Japanese electronics firms' behavior -- and given given their experience, this is understandable. Antidumping duties are a small price to pay for dominance in key sectors like semiconductor memories which will be the determinants of industrial competitiveness for decades to come.

I might add that the assessment of antidumping duties, which are paid into the U.S. Treasury, does little to help U.S. electronics companies and sectors that have been injured by Japanese dumping. The imposition of such duties does not restore sectors that have been destroyed. Thus, for example, as recently as six years ago, U.S. firms were still the world leaders in dynamic RAMs. Today, following sustained Japanese dumping, the U.S. DRAM industry has largely disappeared. In 1985, antidumping duties were imposed on 64K DRAMS, and the Commerce Department has made a preliminary affirmative determination of dumping in 256 K

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[1] Business Week, May 23, 1983

and above DRAMs which could soon lead to additional duties. These measures, however, have not led to a re-entry of U.S. companies into the DRAM field, nor are they likely to do so.

SIA'S Policy Responses

As you know, the U.S. semiconductor industry began to experience a new wave of Japanese dumping in late 1984, and we have taken a number of steps in response. Antidumping actions were commenced by U.S. producers (and, in the case of 256K and above DRAMs, by the U.S. Government) in a number of product areas. SIA filed a petition pursuant to Section 301 of the Trade Act of 1974 seeking relief from Japanese dumping (as well as access to the Japanese market for U.S. producers.)

These actions have led to some relief measures, and additional U.S. government actions may be forthcoming. Whatever remedial measures may ultimately be taken, however, will come too late to help Mostek. Such relief will not restore the U.S. DRAM industry, nor will it return to the U.S. industry the many millions of dollars in losses which it has incurred as a result of Japanese dumping. Those losses are permanent and can never be recovered. Moreover, it is an open question whether Japanese firms will be deterred from further dumping.

In late 1985, as the inadequacy of existing trade remedies became increasingly apparent to us, SIA began examining possible legislative initiatives which would create a more effective deterrent for dumping. Our approach to this problem is noteworthy because our association consists both of semiconductor producers, who sell on the merchant market, and of their customers -- semiconductor end-user companies such as the manufacturers of computers. Our merchant companies, while seeking more effective antidumping remedies, wanted to avoid sweeping or draconian measures which could prove detrimental to their customers. By the same token, while our end-user companies wanted to avoid remedies that could jeopardize their access to critical components, they were at the same time concerned that dumping was eroding their domestic supplier base -- and they viewed more effective antidumping remedies as desirable. Finally, both merchants and end-users were strong proponents of free trade and wanted to avoid protectionist measures and actions inconsistent with the General Agreement on Tariffs and Trade ("GATT").

Reflecting these concerns, SIA developed a balanced legislative initiative to address the problem of dumping. It consists of two elements -- an initiative which would penalize companies that dump repeatedly, and a proposal to provide a private right of action for companies injured by dumping. SIA's proposal is designed to establish an

effective deterrent to dumping, but at the same time has been drafted to minimize the concerns of companies which are, in some cases, dependent upon foreign components. Moreover, SIA's proposal is designed to maintain the balance of concessions under the GATT through use of a GATT savings clause.

SIA's "multiple offender" provision would require the imposition of fines on manufacturers whose products are the subject of a final affirmative antidumping determination on more than one occasion within a ten-year period. In order for a fine to be levied, the "multiple offense" would have to occur within the same product area, defined as the products falling within the same Subpart of a part of a Schedule of the Tariff Schedules of the United States.

The Commerce Department would maintain a record of foreign manufacturers whose products were the subject of affirmative antidumping determinations, and, when a repeat offense occurred, the Commerce Department would bring an action in the Court of International Trade to secure the imposition of a fine. On the second offense, the fine would be equal to 50 percent of the fair market value of the dumped products imported within twelve months of the affirmative determination. On third and subsequent offenses, the fine would be increased to 100 percent.

We believe that these fines are sufficiently stiff to constitute a real deterrent to repeated dumping, but at the same time, are not so draconian that they would amount to a de facto prohibition of the import of products from the offending company.

SIA's proposed legislation would also establish a right of private action for U.S. companies which have been injured by dumping. Such an action could be brought in the Court of International Trade against a manufacturer of the dumped product.

SIA's proposals are designed to ensure the maintenance of the level of concessions under the GATT through the use of a GATT savings clause. Like the telecommunications bill recently reported favorably by this Committee, the SIA bill would authorize the President to provide compensation to other countries if these remedies are subsequently found to be inconsistent with U.S. obligations under the GATT. In addition, the President would be given a mandate to negotiate such bilateral or multilateral agreements as may be necessary to harmonize these remedies with U.S. international obligations.

However, while we have taken care to observe U.S. international legal obligations and the special concerns of consuming companies, we emphasize that these remedies are

intended to be effective. Systematic dumping by a handful of foreign producers is destroying important segments of our most competitive high technology industries. That process will continue until we do something to stop it. In our view, it is not satisfactory simply to maintain the status quo with respect to antidumping enforcement when adherence to the status quo means rapid erosion of the industries upon which our economic future rests.

That is why SIA is supporting this legislation today. We feel it will increase the costs of systematic dumping sufficiently to deter it altogether in most cases, and will do so without harmful effects on consumers or to our commitment to an open trading system. I hope that your Committee gives our proposals careful consideration and support.

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COMPARISON OF SIA AND SPECTER ANTIDUMPING LEGISLATION

	Specter Bill (1655)	SIA Bill
Multiple instances of dumping by one company	-	- Fines imposed for second and subsequent instances of dumping
Compensation for companies injured by dumping	- Private right of action established	- Private right of action established
Scope of actionable conduct	- Dumping - Subsidies - Fraudulent imports	- Dumping
Where action brought	- Court of Int'l Trade or Federal Court	- Court of Int'l Trade
Potential Defendants	- Manufacturer, and exporter or importer if related to manufacturer	- Manufacturer, subsidiary of manufacturer, and companies in which manufacturer holds the principal controlling interest
Prior finding by Commerce/ITC required	- No	- Yes
Consumer of dumped merchandise a potential defendant?	- No (if unrelated to manufacturer)	- No (if unrelated to manufacturer)
Type of relief available	- Equitable relief (prohibition of imports) - Damages	- Damages
Presidential override	- President may nullify court order	-
International obligations	- Declaration that Congress regards legislation as GATT-consistent	- GATT savings clause (U.S. to pay compensation if remedies found to violate GATT; President to negotiate agreements to harmonize remedies with GATT)

Antidumping -- Multiple Offenses

Coverage: Multiple instances of dumping within a 10-year period in a given product area (all products falling within a Subpart of a Part of a Schedule of the TSUS).

First Offense: Same as under current law.

Second Offense: (1) case automatically treated as "critical" circumstances. Duties assessed retroactively to 90 days prior to preliminary determination. (2) Fine imposed equal to 50 percent of the fair market value of imports subject to the affirmative dumping determination in the twelve months preceding that determination. Normal antidumping duties would also be imposed.

Third Offense: Same as the second offense, except fine equals 100 percent of the value of the dumped imports. Same penalty for subsequent offenses.

Enforcement: Commerce Department brings an action to assess penalties in the Court of International Trade.

Persons Potentially Liable: Manufacturers of merchandise subject to an affirmative dumping finding or suspension agreement. Dumping by subsidiaries or joint ventures would count against the parent only if the parent already had been subject to at least one prior affirmative dumping determination. Dumping by foreign subsidiaries of U.S. companies (or foreign joint ventures in which U.S. firms held an interest) would not lead to penalties against U.S. based parent.

International Obligations

The President is authorized to provide compensation if any portion of this Act is found to violate U.S. international legal obligations, and is given a mandate to negotiate such bilateral or multilateral agreements as may be necessary to harmonize the provisions of the Act with existing U.S. obligations.

STATEMENT OF CARL EDQUIST, PRESIDENT, CARLSON TOOL & MANUFACTURING CORP., CEDARBURG, WI; AND FIRST VICE CHAIRMAN, NATIONAL TOOLING AND MACHINING ASSOCIATION

Mr. EDQUIST. Thank you, Senator. My name is Carl Edquist, and I am the president of Carlson Tool & Manufacturing Corp. in Cedarburg, WI. I am also the first vice chairman of the National Tooling & Machining Association. Senator, the problem that plagues the metal-working companies like ours in Wisconsin and my peers in Pennsylvania and Michigan and around the country is unfair foreign competition.

Some of it is quite obvious such as tariffs on American molds crossing the border being two and a half times what we charge the same tool as a duty coming into the United States. Most of our problems arise from less visible ways of competing unfairly. They include all manner of subisidies and subterfuges. As small businesses, we cannot play in the ball game when it comes to seeking relief with the ITC. It is not affordable; so we get no turn at bat.

I would not be able to afford to have my attorney son chase the case for me. Senate bill 1860 is a trade bill which we in metal working can support. What would make it very helpful in our difficulties is our suggested inclusion of the S. 1655 provisions for the private right of damages and the Trade Reform Action Coalition proposals. My written testimony submitted for the record elaborates on those proposals. We believe that this would give us affordable access to justice and a turn at bat, and also it would send a clear signal to our trading partners that they cannot forever beggar their best neighbor and their best customer.

The companies in our coalition understand competition. We live and die with it every day. Unfair competition makes us an endangered species. With that go risks for the general welfare and security of our country. We believe the rules of fair trade should be followed with consequences for those who break them.

As it is now, the innocent parties suffer. The tilt light has gone on, and it is time to blow the whistle.

Thank you very much.

Senator HEINZ. Thank you very much, Mr. Edquist.

Senator HEINZ. Let me ask you what was essentially Senator Danforth's question at the beginning. It is one that I think Mr. Green started to get into, as a matter of fact.

Let's assume that you are a Missouri, or for that matter, a Pennsylvania based chemical manufacturer; and you are selling your chemicals in the United States for $10 a gallon. There is a market in Europe; the price is a little bit more competitive over there. You are selling for $8 a gallon to be competitive in that market, but you still make a profit. You still make a profit even at $8 a gallon. Maybe it is because natural gas is a little cheaper here than imported Soviet natural gas.

Let's say further that my major competitor over there in France, in Europe, is also selling for $8 a gallon, and my entering the market at the same price takes away enough of his business so that, in effect, his cost of production goes up; and he has to start

closing plants. He closes one plant and it costs $1 million to close it.

Now, if Europe had the Specter bill, and it was strictly enforced, as I understand the way S. 1655 would work—I would be liable for $1 million, the cost of closing that plant. Did I do something wrong here?

Mr. GREEN. With deference, Senator Heinz, yes, I think you did. I think you have forgotten that the U.S. market is open and that if I sold at $10 in the U.S. market and $8 in Europe, some of those discounted——

Senator HEINZ. Senator Specter's bill doesn't address the issue where the markets are open.

Mr. GREEN. I understand that, but most markets in the world are not. That is why we are subject to the dumping because dumping can occur——

Senator HEINZ. That is really not responsive to my question.

Mr. GREEN. I will get to that, if I may. Dumping can occur only where there is a protected home market.

Senator HEINZ. I beg your pardon?

Mr. GREEN. Dumping can occur only where there is a protected home market. You are putting the case where there is mirror legislation——

Senator HEINZ. Let me say that I don't understand that argument. I don't know of any analysis that shows that dumping can only take place where there is a protected market.

Mr. GREEN. Mr. Koenig has a Ph.D. in economics; and in a minute, maybe he can respond to that, but I would simply like to make the argument that if I sell for $10 in the United States and $8 in Europe, some of those discounted products that I am selling for $8 in Europe are going to find their way back to the United States and will undercut my ability to continue to sell in the United States at $10.

Many of our foreign competitors that dump in the U.S. market don't have that problem because their home market is protected; and when they sell at a dumped price in a foreign market, that merchandise cannot find its way back and undercut their protected home market and do away with the——

Senator HEINZ. What you are saying is the example that I have proposed cannot take place.

Mr. GREEN. That is correct.

Senator HEINZ. And yet, I submit that it is taking place right now because we have controlled prices on natural gas that make our chemical industry quite competitive.

Mr. GREEN. That is not really dumping, though; that is an input subsidy. Some would characterize it as an input subsidy. [Laughter.]

Senator HEINZ. The way you measure dumping is if the price in this example in Europe is lower than the price in the United States.

Mr. KNOELL. Could I comment on that, Senator? From a business point of view, I think your French plaintiff in this case would probably have difficulty when he got around, under Senator Specter's bill, to proving injury because you would have to not only have the differential in price, but you would have to prove that the injury

flowed from that. And if the price in France was already $8 per unit, he would have great difficulty, I believe, sustaining injury when he got around to that point. And I think that is the answer to the question from a practical point of view. How do you show injury if the price at which the foreigner is selling is merely the current market price in the United States or in the country involved? They might be able to show technical dumping under the differential.

Senator HEINZ. Alan Wolff is representing the semiconductor industry, and he has advocated a somewhat different approach, where I understand what he favors, a private right of action and other things would be triggered only in the case of recidivism.

Mr. WOLFF. No, it would be both. It would be both the private right of action for damages and fines which would go into the U.S. Treasury for recidivists.

Senator HEINZ. Yes, but you would only trigger private right of action and extra fines in the case of recidivism?

Mr. WOLFF. No.

Senator HEINZ. Maybe I misunderstood your testimony.

Mr. WOLFF. Well, three minutes might not be the most time in the world to convey these ideas. I apologize if I was a bit obscure. The idea would be very similar to the Specter bill—some differences—not entirely different from the Guarini provision, to have a private right of action for damages, entirely separate from dealing with the problem of multiple offenders, which would be met with a fine and deposited in the Treasury.

It would be possible to combine the two, but that is not the proposal.

Senator HEINZ. All right. The administration clearly, in their testimony here today, is saying, well, if you are going to do anything in this area, the only place you should do it is for multiple offenders.

Mr. WOLFF. Clearly, they are troubled by the semiconductor example of repeated instances. I submit that it has happened in steel as well, repeated instances of dumping.

Senator HEINZ. So, let me ask the others. How would you feel about a threshold that required some form of multiple offense or recidivism? Would that be of help if that were the threshold, even if there were a threshold that had to be passed before the full weight of both the Government and private action could descend upon the offender?

Mr. KNOELL. I guess I am concerned by it, Senator, on the basis that the whole objective here, in my judgment, is to discourage what has become such a common practice of unfair trade. And in order to do that, there has to be some real threat out there; and if you put too many hurdles between us and the threat, then I think you remove the threat.

Senator HEINZ. As a general principle, I don't disagree, but if it is such common practice, why would not the threshold of multiple offense be easy to meet? And therefore, it is not a very substantial threshold.

Mr. KNOELL. I can see one very serious problem that we in the steel industry would have had over the past 15 years. We frequently get talked out of them imposing dumping or finding dumping be-

cause, when you have an industry such as steel, it becomes such a large case that the administration intervenes and talks you out of it, having it go to full hearing. They come up with some sort of a concocted solution that is supposed to solve the problem.

So, we would have never had, in many cases, our multiple repeat items. Now, this is one of the problems that we run into constantly, of all the deals that have been cut that have been supposed to have solved the problem.

Senator HEINZ. Mr. Edquist, how do you feel about that same question?

Mr. EDQUIST. Back to France, Senator?

Senator HEINZ. No, the one I just addressed to Mr. Knoell; having a threshold of some multiple offense.

Mr. EDQUIST. During the period of time that these multiple events were being identified as unfair trade items, a small company might suffer serious damage after one or two. So, it would have to be tailored in a special——

Senator HEINZ. Suppose it were just a second offense?

Mr. WOLFF. If I might just add, Mostek went under really because of one product: 64 K drams. And that is a half-billion dollar company with 10,000 employees. So, it is not——

Senator HEINZ. How many antidumping findings had there been?

Mr. WOLFF. One.

Senator HEINZ. Just one?

Mr. WOLFF. Just one. It hadn't come out yet. As a matter of fact, the finding came out 7 months after this firm departed, and it is no longer in business.

Senator HEINZ. It did them a lot of good, didn't it?

Mr. WOLFF. Not too much.

Senator HEINZ. Did they pay their legal bills?

Mr. WOLFF. We were not the attorneys. [Laughter.]

Senator HEINZ. I don't know whether you say that with regret or relief. I do have a question, Alan, for you on this regarding S. 2408, which permits suits only against foreign manufacturers or entities controlled by them. I gather you favor that bill; is that right?

Mr. WOLFF. That it should be limited just to foreign manufacturers and controlled entities?

Senator HEINZ. Yes.

Mr. WOLFF. That is right.

Senator HEINZ. Wouldn't it be common that you can't get the manufacturer into the U.S. court; and anyway, why should importers be immune from liability?

Mr. WOLFF. There is a balance to be drawn. There are many importers obviously dealing with the most products, when they are unrelated importers. They don't have, particularly in a cost-of-production case, information as to whether the product is dumped.

Senator HEINZ. Suppose they know the product is being dumped?

Mr. WOLFF. That is not an easy thing to prove in a court of law, and they are behaving in a rational manner to buy things at market.

Senator HEINZ. It is not easy to prove; but suppose, in fact, they do know it? We are not arguing on the question of whether something is provable; we are arguing a question of whether, if in fact they knew it, they should be subject to prosecution. The court will

decide whether they knew it or had reason to know or whatever the standard is.

Mr. WOLFF. First, since 1916, no one has been able to prove knowledge in the area of dumping. Second, I would still say, "no"; do not subject them to antidumping penalties. We have a customer base in this country of computer makers, telecommunications makers who must buy at market. It seems to me it is the job of U.S. trade laws to try to make those market prices fair prices, but not to put our firms at a competitive disadvantage if we can't halt the dumping.

Senator HEINZ. Very well. Any other parting comments?

Mr. KNOELL. I would disagree with that on the basis of the point that you first made: I think if you cannot get at the importer, if he has knowledge, you may make the law really meaningless because it will be so difficult to get at the foreign producer to bring the action.

Senator HEINZ. We do have a reason-to-know standard in at least one statute dealing with the Foreign Practices Act, which certainly seems to scare exporters. I suppose it would scare importers, too, notwithstanding that nothing has happened since 1916.

Mr. WOLFF. As I say, there is a real question as to whether you really want to scare importers. I think we want to halt the practice without putting our customers out of business.

Senator HEINZ. Very well. Gentlemen, thank you very much. This has been very helpful. We appreciate your testimony. Would our next panel please come forward?

Mr. Donald Flowers, Edward Black, Peter Suchman, and Gary Horlick. Our first witness on this panel, representing the Florists Delivery Association, appropriately enough is Mr. Flowers, who is past president of the florists association.

Mr. FLOWERS. Thank you.

Senator HEINZ. I am tempted to ask whether your surname was an asset or not in your election to that position, but you don't have to answer that. Please proceed, Mr. Flowers.

STATEMENT OF DONALD FLOWERS, PAST PRESIDENT, FLORISTS' TRANSWORLD DELIVERY ASSOCIATION, RANDALLSTOWN, MD

Mr. FLOWERS. Mr. Chairman, I appear in opposition to S. 1655 on behalf of Florists' Transworld Delivery Association, a cooperative of about 20,000 independent retail florists and small business firms. In my prepared statement, I make the following major points.

FTD has historically opposed unjustified restrictions on imports, based on the need for an adequate supply of quality cut flowers available in the marketplace at reasonable prices to retailers and consumers. FTD has in effect served as the voice of the consumer in these actions. FTD, however, opposes unfair trade practices, where proven, such as dumping and subsidized foreign exports.

The domestic industry has not succeeded in proving economic injury in the several cases brought before Government agencies to date.

FTD is the major, almost the only, marketing force for floriculture products at the consumer level, and its policy on imports has

tended to keep flowers competitive with other gift-type products in the marketplace.

S. 1655 works against this objective by offering a free-for-all invitation to private parties to file suits willy-nilly in the hope of reaping rewards, whether there has been injury or not—in many ways a situation similar to medical malpractice cases now prevalent in the courts.

S. 1655 creates a double penalty, one public and one private.

S. 1655 will result in higher prices by raising the cost of a product to retailers and consumers.

Commercial floriculture is largely made up of family businesses which will be irreparably harmed when friend sues friend as a result of the gratuitous invitation to do so by Government. Chaotic conditions will be created in the industry. Domestic producers will be able to harass the rest of the industry, either with suits or threats of suits, using a weapon that could be seen as an attempt to badger those who use imported goods, including retailers and consumers, to no longer do so.

New products may be prevented from coming into the market or from expanding their toeholds in the market despite consumer preferences.

The consumer is always, in this type of legislation, left without a spokesman for his interests. Under all the circumstances, we believe that full and fair enforcement of existing law and regulation which conform to international trade rules will provide an adequate remedy to domestic industries. Shortcuts to achieve justice are never a good idea. Thank you very much, Mr. Chairman.

Senator HEINZ. Mr. Flowers, thank you very much. Mr. Black.

[The prepared written statement of Mr. Flowers follows:]

STATEMENT ON S. 1655

DON FLOWERS, PAST PRESIDENT
FLORISTS' TRANSWORLD DELIVERY ASSOCIATION
SOUTHFIELD, MICHIGAN

Before the

INTERNATIONAL TRADE SUBCOMMITTEE

COMMITTEE ON FINANCE

U.S. SENATE

July 18, 1986

Mr. Chairman and Members of the Committee:

My name is Don Flowers. I appear on behalf of Florists' Transworld Delivery Association, a cooperative of about 20,000 independent retail florist small business firms. FTD, as our intercity florists delivery service is generally known, was founded in 1910 and has continuously served the public since that time. Our headquarters are located in Southfield, Michigan. I am a retail florist and grower in Randallstown, Maryland and a pot plant grower near Tampa, Florida.

As a past president of FTD and a member of its President's Council on Government and Industry Affairs, I appear in opposition to S. 1655, a bill to provide a retroactive right to sue for damages to private parties who may claim to have been harmed by dumping of imported products.

First, let me state the basis for FTD's opposition to this legislation. In recent years, we have taken a progressivly more active role in the so-called import issue because of the entry into the U.S. market of cut flower imports from a number of countries, beginning about 1970. FTD has opposed unjustified restrictions on imports based on its policy calling for an adequate supply of quality flowers in the marketplace at reasonable prices to retailers and consumers. In effect, FTD has served as the consumer's advocate in this area--for one reason because the trade laws of the U.S. do not provide for any representation of consumer's interest in situations like the present one.

The domestic industry of growers and producers have brought two Section 201 (escape clause) actions before the International Trade Commission (all cut flowers, 1977; cut roses, 1983) and several dumping and countervailing duty petitions. All have been without success on the proof of injury question and of very limited success in the CVD area where no injury investigation was made.

To save time, I will not repeat some of the more technical arguments against S. 1655 but would note the unanimous opposition to it of the U.S. Trade Representative, the Departments of Justice and Commerce, and the Federal Trade Commission. I will try to relate my testimony as directly as possible to the commercial floriculture industry.

FTD is the major marketing force for floricultural products at the consumer level. As such, it is very concerned about the willingness of consumers to continue to increase their expenditures of disposable income for a perishable product. The whole chain of production, distribution and consumption of cut flowers depends on keeping this product available, of high quality, and within a price range competitive with other gift-type products. S. 1655 works against the thrust of our marketing activities by creating a free-for-all environment inviting law suits willy-nilly, whether or not the complaining domestic firm

has been injured by the alleged dumping. Certainly it will be a boon to the legal fraternity, a burden to the courts and a significantly increase cost to consumers.

S. 1655 works in the same way as other U.S. international trade statutes in that it does not give the consumer any voice in proceedings that will result in higher prices based on increased costs to retailers of cut flowers and plants. FTD, believing in competition rather than trade restrictions, will this year spend about $24 million of its members' dollars in advertising and promotion to expand this increasingly important consumer market.

We have previously (and are now) arguing our viewpoint in actions before the foreign trade agencies of the U.S. We believe these forums operate fairly and are fully capable of dealing with the various facets of the import issue related to unfair trade practices. We do not believe that granting private remedies to domestic producers will improve this situation. Instead, it will result in harassment of the entire trading community--domestic and foreign. Even though it is now possible to call foreign producers into the Court of International Trade, the practical difficulty of doing this makes the importer or consignee, such as a wholesaler or retailer, ultimately liable. The goal of this legislation could be seen as an attempt to badger those who use imported goods--including retailers and consumers--into no longer doing so.

Thus our view is that full and fair enforcement of existing law and regulation will provide an adequate remedy to domestic industries. And in fact, the Administration is pursuing this approach vigorously. Shortcuts to "justice" are never a good idea. FTD opposes, where proven, unfair trade practices such as dumping and subsidized foreign exports.

The floriculture industry is made up of family businesses to a large degree. Although there is economic specialization, there is still a "mom and pop" image to a business that is responsible for as much as $2.5 billion in economic activity at the wholesale level and perhaps $6.5 billion at the consumer level. Aside from being an affirmation of small business in the age of conglomerates, it is a business that will be inevitably and irreparably harmed when friend sues friend as a result of a gratuitious invitation from the government to do so. The result will be a form of chaos never before seen in our business with disruptive results that could never be repaired.

The objections to Section 138 of S. 1655 are numerous, but some of the more important ones are:

1. It invites a free-for-all environment in which domestic industries, who are competing with a dumped product, will sue whether or not they are actually injured, in the hope of reaping a windfall under the "economic loss" provision. It invites frivolous suits. In this sense, the private remedy provision brings to the

United States trade laws many of the problems of medical malpractice cases, i.e., a rash of groundless suits filed in the hope of a high award.

2. It is a double penalty, since a private remedy suit can only be filed after a dumping duty is imposed. The concept behind dumping duties is to level the playing field--not to tilt it the other way. The U.S. should work toward and open and liberal trading system, and not invite foreign retaliation.

3. It harms U.S. consumers since they wind up paying the added costs in the form of higher prices for products.

4. It will raise prices for <u>all</u> goods (that is, domestic and imported products) which are the subject of dumping actions. If a private remedy is granted, domestic producers will raise their prices to the level of the increased cost of the imported product. The consumer will be the big loser.

May I conclude by saying that we seem to be in a time in which every conceivable restraint on international trade has been inserted in pending legislation. H.R. 4800, for instance, contains a provision that the USTR and the Department of Agriculture make a study of the impact of imports of roses. We wonder why that study is not broad enough to include an analysis of the impact of those imports on the consumer who is, I fear, the forgotten player in a power game in which he may be the ultimate victim.

Thank you for hearing our views. I would be glad to try to answer questions you may have.

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STATEMENT OF EDWARD J. BLACK, VICE PRESIDENT AND GENERAL COUNSEL, COMPUTER & COMMUNICATION INDUSTRY ASSOCIATION, WASHINGTON, DC

Mr. BLACK. Mr. Chairman, I want to thank you for the opportunity to appear before the subcommittee to express our views on this important legislation. CCIA is a CEO based organization that represents over 60 companies whose industry derived revenues are in excess of $50 billion and who employ over 500,000 people. We represent all segments of the computer and communications industry.

As an industry, our primary goal in the international trade arena is to be as minimally encumbered as possible by foreign and domestic barriers to trade, including tariffs, regulations, or other distortions of trade, and to foster a world market place which is as open and competitive as possible. The question for us and for the country is how to become much more effective in preventing and curbing trade-distorting and unfair practices without further distorting our own open market.

The dumping provisions of our trade laws have not been of critical importance to our industry in the past; but for several reasons, we believe they will become more important in the future. We have witnessed the trade patterns in semiconductors and anticipate that our current and future competitors may target our industry and aggressively dump competing products in the United States with relatively economic impunity. Our competitors are often large integrated companies with solid economic bases which could withstand price levels that might do severe damage to portions of our industry. Many companies would not be able to recover in the wake of a major dumping campaign, especially if combined with other trade restrictions.

We believe that the international rules and policies governing trade ought to be able to prevent a major targeted dumping campaign from seizing substantial market share, from eliminating competitors, or from retarding industry innovation. We support changes in the dumping area because current laws are not able to credibly deter aggressive strategic dumping. Where proposed changes are likely to require GATT agreement, however, we must aggressively seek multilateral support for them and not take unilateral action.

We support efforts to get GATT agreement: To allow retroactive duties; to compensate injured industries; to impose special penalties for repeated and abusive dumping; and to extend dumping protection to third country markets. We also support actions which we will go into later that might strengthen the 1916 act, which is on the books; and we also think that remedies such as section 301 can be used to deal with dumping practices in ways that have not been used before to stop predatory dumping. But radical changes in the dumping law beyond these may both be unnecessary and ineffective and adversely impact other legitimate U.S. interests in various ways. Dumping law is an area ill-suited by its nature and too unpredictable in its fact finding to be used as a vehicle to create a trade panacea; and it should not be used to shelter hidden protectionist agendas.

We are concerned that any legislation—and we think this legislation is such legislation–that would be likely to: Invite retaliation and to damage innocent competitive industries; result in mirror legislation overseas and, in effect, become a nontariff barrier to our exports; expose companies to unpredictable and burdensome proceedings in U.S. and foreign courts; violate our international obligations; weaken our efforts to expand and strengthen GATT, to inhibit legitimate imports; and to provide inadequate due process protections.

The legitimate interests of U.S. exporters who face mirror legislation, of other domestic industries who could be the victims of retaliation, of others who indirectly benefit in many ways from the order which flows from our general international adherence to GATT and other international commitments, of U.S. consumers and foreign importers who fairly price in our market but do so competitively, should not be subordinated to the interests of the domestic industry which is harmed by dumping. Other remedies are available.

In conclusion, I would like to say that even if such legislation were enacted and found acceptable under GATT, which we don't think it would be as it is structured, we would be equally concerned because of the mirror effect. We think facing this kind of statute in foreign markets is a very serious problem for exporting industries.

Thank you, Mr. Chairman.

Senator HEINZ. Mr. Black, thank you. Mr. Suchman.

[The prepared written statement of Mr. Black follows:]

TESTIMONY OF

EDWARD J. BLACK

VICE PRESIDENT AND GENERAL COUNSEL

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

ON

S. 1655

BEFORE THE SUBCOMMITTEE ON INTERNATIONAL TRADE

COMMITTEE ON FINANCE

U.S. SENATE

JULY 18, 1986

Mr. Chairman, Members of the Subcommittee, I am Edward J. Black, General Counsel and Vice President for International Affairs for the Computer & Communications Industry Association. It is a pleasure to appear before the Subcommittee to express our views on the very important legislation you are considering.

CCIA is a national trade association comprised of over 60 manufacturers and providers of computer, information processing, and communications-related products and services including large mainframes, mini and micro computers; semiconductors; peripheral equipment; software products; telecommunications equipment, systems, and services. Company involvement in CCIA is at the chief executive officer level, and this provides valuable opportunities for peer level exchange of views on critical industry issues.

CCIA's member companies range in size from young, entrepreneurial firms to many of the largest and best known companies in both the computer and communications industries. Generally recognized as innovators in their respective areas of specialization, CCIA's members are credited with driving and shaping the industry via new technologies and products. Taken together, companies within CCIA's membership generate annual industry-derived revenues in excess of $50 billion and employ over 500,000 people. CCIA's member companies export approximately 35 percent of their U.S.-manufactured products, making them a significant positive contributor to our nation's balance of trade.

A central tenant of CCIA is the fostering of a competitive business environment, one in which companies can succeed and grow -- based solely on their own merits. Toward this end, CCIA seeks to ensure that its members' future growth opportunities are not inhibited by poorly-conceived legislation, inept regulation, or ill-advised judicial decisions.

The importance of the computer and communications industries to our economic well being is growing. Not only do this and related industries account for an increasing proportion of the U.S. economy, but they also provide new equipment, processes, efficiencies, and solutions for many other segments of our economy which are trying to remain globally competitive. A strong and vital domestic industry able to compete world wide is essential to overall American prosperity and to our national security.

Because of our industry's importance and growth potential we face very stiff competition from companies in countries which have decided that they must develop their own domestic

industry. We, therefore, face growing efforts to protect foreign markets and to unfairly penetrate our own. The costs of innovation, research and development, and retooling to produce newer generations of products are substantial and most companies must develop an international market base and stay internationally competitive in order to survive. Therefore, an open world market place is essential for our future.

The statistics on overall trade and those for various segments of our industry have been presented to the Subcommittee many times before. The important points to be derived from these statistics are that our industry is still the world leader in most segments of the industry and is likely to remain so in the near future, but that we face serious problems in the global marketplace which, if not addressed, will continue to erode our performance.

Some factors which distinguish and define our industry and our approach to the international arena are that:

- In most parts of our industry U.S. producers are equal to, if not superior to, most other competitors in price and performance, but are facing growing competition;
- We are facing inevitable, long-term increases in domestic and worldwide demand;
- The pace of innovation, product development, and changes in product life cycle is much faster than that of most other industries;
- Initial market entry and development of market share is especially important in our industry because, in addition to the general customer tendency to give repeat business, the financial and systems commitment connected with major purchases by users make it very difficult for users to switch suppliers; and
- A relatively high percentage of our industry's revenues, approximately 35 percent, come from exports, and these revenues are vital to our continued innovation and growth.

TRADE CONCERNS

The situation we face as we try to compete in the international market is far less conducive to our industry's international competitiveness than we would like. We do not delude ourselves that policies pursued by the Administration, legislation passed by the Congress, or agreements reached with other nations are likely to radically improve the situation. As an industry, our primary goal in the international trade arena is to be as unencumbered as possible by foreign or domestic regulation, barriers to trade, tariffs or other financial distortions, and to foster a world-market system which is as open and competitive as possible. The question for us and for the country is how to become much more effective in preventing and curbing trade distorting and unfair practices without further distorting our own open market.

As we have attempted to develop policy responses to the international trade problems we face, we have reassessed and reaffirmed certain long held premises and principles. Among the most important of these are:

- The tremendous prosperity and expansion of the U.S. economy is largely derived form our relatively open and competitive market;

- An open, competitive, and unfettered domestic and international marketplace provides the optimum benefits to both producers and consumers -- few countries allow such openness without major exceptions, including the U.S.;

- The computer, communications and other high-tech industries have especially benefited from the overall openness of our economy;

- There are serious economic and political pressures which threaten to move us toward a highly regulated, if not protectionist, world;

DUMPING

The dumping provisions of our trade laws have not been of critical importance to our industry in the past but, for several reasons, we believe they will become more important in the future. We have witnessed the trade patterns in semiconductors and anticipate that our current and future competitors may in the future aggressively dump competing products in the U.S. with relative economic impunity. The

current nature of our dumping laws, as well as other weaknesses in our trade policies and laws, invite such action. Our competitors are often large and broadly vertically integrated companies with solid economic bases which could withstand price levels that might do severe damage to portions of our industry. Because of the need for a constant infusion of capital for innovation, many companies would not be able to recover in the wake of a major dumping campaign, especially if combined with other trade restrictions.

We believe that the international rules and policies governing trade ought to be able to prevent a major targeted dumping campaign from gaining a substantial market share or from driving reasonably efficient competitors out of business, or from curtailing a competitor's ability to modernize and develop new generations of products.

Because we are not confident that such campaigns could now be stopped before they accomplished such goals, the computer and communications industry understands and sympathizes with the desire to prevent dumping abuses and to amend relevant agreements, codes, and laws to enable them to better deter serious dumping behavior. We support carefully balanced steps which move us in that direction, including some reform of:

- o GATT dumping rules;
- o U.S. dumping laws, policies and procedures;
- o Other U.S. trade laws and policies.

We believe, however, that a disproportionate responsibility for the overall trade, and specific industry, problems the U.S. has experienced is being ascribed to deficiencies in the dumping laws. Radical changes in the dumping laws may be less necessary and effective than other actions and may adversely impact other legitimate U.S. interests in various ways. For example, had there been early aggressive actions by responsible officials to use Section 301, and to reverse the high value of the dollar, U.S. semiconductor manufacturers could have benefited. It was not just the dumping law which was a problem and changes to dumping laws will not cure similar future problems. We must take care when addressing one small provision of our trade law not to attempt to remedy our full array of trade problems. Dumping law is an area ill suited by its nature, and too unpredictable in its fact finding, to be used as the vehicle to create a trade panacea; and it should not be used to shelter hidden protectionist agendas.

The proposals that we have seen so far are overly ambitious and, as a result, risk being counterproductive. We are very concerned about any legislation that would likely:

- o Involve us in retaliatory conflicts and damage our most globally competitive industries;
- o Create U.S. legal standards and remedies that would be mirrored overseas and used as foreign non-tariff barriers (NTBs) to inhibit our legitimate exports to foreign markets;
- o Expose companies to unpredictable actions in U.S. and foreign courts;
- o Violate our international obligations;
- o Weaken our efforts to expand and strengthen GATT; or
- o Inhibit legitimate importers' products from entering our market at competitive price levels, and undermine legitimate consumer interests.

SPECIFIC RESERVATIONS CONCERNING S. 1655 AND RELATED PROPOSALS

Civil Action Remedy in General

Broad scale authorization of a civil remedy action against dumping behavior appears designed to accomplish several generally desirable goals: to compensate those injured by dumping; to enhance general deterrence; and to enhance specific deterrence and impose some sanction on those benefitting from dumping.

Compensation -- Providing relief for those injured by unfair practices is a worthwhile goal, and some expansion of the interpretation of the 1916 dumping laws could provide for this in some instances. Various other provisions of current law can also be used to provide compensation. In addition, we support getting GATT agreement to having dumping duties retroactively imposed for the duration of the violation. Payments from a Treasury fund might also be part of an acceptable solution. The general international dumping code is not designed to be used to provide compensation and, beyond making retroactive duties available through a government administered fund, should not be stretched in that direction.

General Deterrence -- We support efforts to deter dumping behavior before it begins and believe some modifications of current rules could be agreed to by GATT. More vigorous enforcement by U.S. officials of existing dumping and other trade laws, and vigorous bilateral negotiations could also provide substantial deterrence.

The possibility of liability in a civil action initiated by private parties, however, is a potential source of harassment to all exporters trying to sell into any market with such a law. It is liable to be too effective as a general deterrent, and since dumping calculations are imprecise and unpredictable, and the risk of liability and damages too great legitimate importers and consumers are likely to overrestrain themselves.

Specific Deterrence and Punishment -- The 1916 act could be more widely used and, again, we would support that. We also urge multilateral efforts to develop multiple offender rules to reach the conscious, strategic dumper. Since all dumping is not equally reprehensible, damaging, or in need of specific deterrence, a civil action approach which does not adequately recognize these distinctions is overreaching. The pending proposals specifically lessen the requirement to show predatory intent, for example.

There are other tools to accomplish the central legitimate goals behind the civil action remedy. There are many consequences of resorting to it that are largely negative or unpredictable, both legally and economically.

The most predictable thing about such a remedy is that it would cause the development of a whole new legal sub-industry. For various due process reasons cited later, we believe full, complex litigation, not bound by decisions of other bodies, would be required. Substantial time, expense, and resources would be involved, yet such suits would not likely provide an expeditious alternative to current law. Most competitive, efficient, and productive companies don't need or want more lawyers and lawsuits in the middle of their business and business decisions. We therefore believe that creation of a civil action remedy for dumping is not necessary and is potentially dangerous to many legitimate U.S. economic and trade interests.

Changes in Standards for Finding Civil Damages Liability

The bill would remove the requirements that, in addition to finding that goods are sold in the U.S. at less than their foreign market value and are causing or threatening injury, such imports must be found to be sold:

- "commonly and systematically" at a price
- "substantially" less than their actual price, and that their
- sale must have involved a "predatory intent."

We believe statutory changes to this GATT grandfathered 1916 provision would be unwise. We would urge that Sense of the Congress Resolution assert that this statute should be interpreted in such a way that i becomes an effective tool to combat serious dumping abuses, without removing its privileged GATT status.

The Class of Those Who May be Held Liable is Greatly Expanded

Almost any foreign manufacturer, exporter, or U.S. importer would be potentially liable under provision of this bill. Because of the relative ease of reaching some potential defendants' "deep pockets," U.S. companies could wind up as the most frequent target of such civil action. Potentially huge liability attaches even to defendants who have not intentionally engaged in any improper action. A tight nexus tying the defendant to the cause of injury must be required. Standards to define intent or conspiratorial involvement need to be far more exacting than "reason to know" or some arbitrary set of corporate relationships, especially when such substantial liability can result. And no consumer, whether individual or corporate should be faulted for buying a less expensive product.

To the extent that this expansive concept of defendants has developed in order to ensure some party is available to be sued, it is probably unnecessary as the law surrounding personal jurisdiction should allow the involvement of foreign companies which purposefully exploit the forum's market. Legislation specifying world-wide process could be developed to ensure the desired result.

Changes in the Types of Action or Relief That Can Be Taken or Provided.

Under current dumping law, the normal remedy for dumping is the imposition of duties equal to the dumping margin which are paid to the government. Under the terms of the 1916 Act, an injured firm can sue to obtain treble damages in certain

circumstances. We would support trying to obtain GATT agreement to allow special damages for multiple offenders, as well as provisions for broader damage considerations and thus compensation, provided the liability standards remain fairly rigorous.

In so far as the legislation also authorizes bans on imports, it is particularly unwise. The impact of such restrictions are complex and could result in depriving U.S. customers of access to essential components or supplies.

GATT Inconsistency

Pending legislation appears to be inconsistent with GATT on several grounds including:

- o Unilateral modification of agreed upon rules;
- o Recovery of monetary damages are not generally authorized;
- o Changing the 1916 Act alters its grandfathered status; and
- o Bans on imports are not authorized.

Although there are weaknesses in the GATT structure, the U.S. response should be efforts to enforce and strengthen it, not to blatently violate, disregard, or unilaterally alter it. The threat of retaliation in this context is a real one and could severely impact innocent U.S. industries.

Some recent proposals have conceded that if the proposed legislation is found to violate U.S. obligations under GATT, other innocent industries would become obligated to yield concessions equivalent to potential damages improperly assessed against defendants under the proposed legislation. This is hardly an acceptable alternative in legislation designed to increase equitable treatment for U.S. companies.

Finally, if such legislation were enacted and were found acceptable under GATT or emulated in mirror legislation, U.S. companies trading around the world would be subject to its terms. Even where foreign court systems are likely to be fair to U.S. corporations, foreign private parties and, in some cases, governments could use this authority to conduct legal harassment against U.S. companies. We could be spawning a new non-tariff barrier well suited for use against "wealthy, deep pocket" U.S. companies.

Weight Given to Administrative Proceedings

Any attempt to give special consideration to Department of Commerce or International Trade Commission proceedings is likely to raise collateral estoppel problems. Because agency proceedings do not involve all parties who might be defendants under a civil action and lack certain other due process requirements relating to notice, personal service, cross examination, evidence, discovery, and subpoena power, the use of their results in a civil action would invalidate such proceedings. Realistically, there is no alternative to a full trial on all the issues.

Damages

The issue of what damages are reasonable in a civil dumping action has many far reaching implications. If a domestic company suffers a patent loss, a loss of market share, or a curtailment of its research and development, is a defendant liable for all consequences flowing from these actions? The potential area of liability and damages is far too broad, and would need far greater statutory definition and limits.

CONCLUSION

In conclusion, we must strongly urge you to refrain from proceeding with the idea of a civil action remedy in the dumping area. While some of our concerns could be ameliorated by drafting changes, the fundamental weaknesses would remain.

We have urged action in a number of areas which could lead to reasonable modification of, and improvements in, the dumping laws and related areas because we want our industry and others to be able to compete in the U.S. market free from the unfair competition of foreign dumping. We would like to see changes made which are sufficient to deter targeted dumping campaigns which can seize substantial market share, eliminate competitors or retard industry innovation, but our industry is also strongly committed to, and dependent upon, an open global marketplace. In some areas the U.S. can clearly act alone and should, but therefore, we believe that where proposed changes are likely to require GATT agreement, we must aggressively seek multilateral support for them and not take unilateral action.

Our opposition to a civil action remedy is centered in its overly exclusive focus on the legitimate plight of a particular U.S. industry affected by dumping. The legitimate

interests of U.S. consumers, fair foreign competitively pricing importers, U.S. exporters who could face mirror legislation, other U.S. domestic industries who could be the victims of retaliation or compensation, and others who indirectly benefit in many ways from the order flowing from the general international adherence to GATT and to other international commitments, are made subservient to the portion of industry hurt by dumping.

For the reasons cited earlier and because the full implications of such legislation have not been adequately studied and considered and too many questions still remain. This legislation should not be included in broad trade legislation.

Thank you again for the opportunity to present our views.

TESTIMONY SUMMARY, EDWARD J. BLACK, CCIA

The computer and communications industry imports and exports components or final products to and from many countries around the world. About 35 percent of our revenues are from exports.

Although we face increasingly strong competition in foreign markets and the U.S. market, we are committed to open competitive markets which are essential to economic prosperity. We favor vigorous action to enforce our trade rights and to promote equity and fairness, but we must act within the international trading framework.
We support changes in the dumping area because current laws are not able to credibly deter aggressive strategic dumping.

We support efforts to get GATT agreement: to allow retroactive duties; to compensate injured industries; to impose special penalties for repeated and abusive dumping; and to extend dumping protection to third country markets. Other available trade provisions such as Section 301 should also be used to stop predatory dumping.

However, we strongly oppose the passage of civil action legislation because, while all the implications of such legislation have not been adequately examined, some are clearly very damaging.

We are very concerned about any legislation that would be likely to: invite retaliation and damage innocent competitive industries; result in mirror legislation overseas, and become a non-tariff barrier to our exports; expose companies to unpredictable actions in U.S. and foreign courts; violate our international obligations; weaken our efforts to expand and strengthen GATT; or inhibit legitimate imports.

STATEMENT OF PETER SUCHMAN, MEMBER, TRADE POLICY COMMITTEE, AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS; AND PARTNER, SHARRETTS, PALEY, CARTER & BLAUVELT, WASHINGTON, DC

Mr. SUCHMAN. Mr. Chairman, I appear here today on behalf of the American Association of Exporters and Importers, a national organization comprised of approximately 1,100 U.S. firms involved in every facet of international trade. I assume the full text of my prepared statement will be included in the record.

Senator HEINZ. That is correct.

Mr. SUCHMAN. It seems to us that the clear intention of this legislation is to provide antitrust-type private relief to companies which believe they have been impacted by imports, without requiring that the complaining parties be able to sustain the burden of proof required by the antitrust laws.

Given the [stature] of the United States in the world's trading system, and as Mr. Holmer indicated this morning, we are the world's leading exporter, we think that this is throwing the baby out with the bathwater. And I would like to address the problems of this legislation from the point of view of the association's exporter members.

We should keep in mind that the United States is the exporting country against which antidumping actions are taken more often than any other country. I find it difficult to understand Mr. Green's arguments earlier about dumping only occurring from closed markets, in view of the fact that I think we would all acknowledge that the United States is the world's most open market. Therefore, we have to look at this legislation from the view of American exporters and what would happen to them if they had to face mirror legislation abroad. Are these American producers criminals? Are they acting unlawfully? Are they undermining foreign economies? They aren't.

Price discrimination in different markets is not and has never been considered under U.S. or international law to be criminal or unlawful. Businessmen worldwide, including those here in the United States, price in response to the conditions in the markets into which they must sell. If they behave in a predatory way and seek to monopolize trade, they are subject to antitrust laws, and the United States maintains an array of antitrust laws. And if there is a problem with the U.S. antitrust laws and their application to imports, then those laws should be amended; but that is not what this legislation would do, and we should be clear about that because S. 1655 is not an amendment to the antitrust laws of the United States. It differs significantly in both substance and procedure from the laws which cover domestic commerce and would, therefore, create a situation in which there were more stringent restrictions on import competition than domestic competition in the U.S. marketplace.

Specifically, this bill has no requirement for showing of intent. Those involved in international commerce would be acting unlawfully and vulnerable to damages and injunctive relief without any showing that they intended to injure a U.S. industry or restrain or monopolize U.S. trade; and there is no requirement for showing

that their acts had the effect of monopolizing or restraining U.S. trade.

Furthermore, the treatment of administrative rulings by the Commerce Department and [ITC] the International Trade Commission as a prima facie showing of the elements necessary for relief is totally imcompatible with due process. [and] If American exporters had to face that kind of treatment abroad and not be subject to the same rules of evidence and rules of procedure as pertain to civil actions in the courts of that country, the United States would certainly violently object. [and] We should not forget [also] the part of this statute that deals with violation of the Customs laws, where mere negligence by a junior employee of a large corporation could subject that corporation to the draconian penalties of the statute.

In conclusion, no businessman, American or foreign, could afford to face the uncertainties which this legislation would create. Price competition from imports would simply disappear for a wide variety of products, regardless of whether the imports were below fair value. Retaliatory actions by our trading partners would be inevitable, and the result would be a cartilization of trade through minimum import pricing schemes or out-of-court settlements throughout the world.

We can think of no more anticompetitive legislation than this, and we trust that this committee will not approve it.

Thank you.

Senator HEINZ. Thank you. Mr. Horlick.

[The prepared written statement of Mr. Suchman follows:]

STATEMENT OF

THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

BY PETER SUCHMAN

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

SENATE COMMITTEE ON FINANCE

ON

THE UNFAIR FOREIGN COMPETITION ACT OF 1985
(S. 1655)

FRIDAY, JULY 18, 1986

American Association of
Exporters and
Importers 11 West 42nd Street, New York, N.Y. 10036 (212) 944-2230

Good Morning, Chairman Danforth, members of the Subcommittee. My name is Peter O. Suchman. I am an attorney in the private practice of international trade law with the firm of Sharretts, Paley, Carter and Blauvelt, and was for many years involved in trade policy formulation and the administration of trade law in the U.S. government. I am also a member of the Trade Policy Committee of the American Association of Exporters and Importers and it is in that capacity that I appear here today. The Association is a national organization comprised of approximately 1100 U.S. firms involved in every facet of international trade. Our members are active in importing and exporting a broad range of products including chemicals, machinery, electronics, textiles and apparel, footwear, foodstuffs, automobiles, and wines. Association members are also involved in the service industries which serve the trade community such as customs brokers, freight forwarders, banks, attorneys and insurance carriers.

We are pleased to have this opportunity to give you our comments on S.1655.

S. 1655, the "Unfair Foreign Competition Act of 1985" would amend the Revenue Act of 1916 to provide that an interested party can bring an action for damages and obtain equitable relief from importations or sales which are found to be dumped, within the meaning of the current antidumping law (19 U.S.C. 1673). In addition an interested party could bring an action for equitable relief and damages because of importations which are in violation of section 592(a) of the Tariff Act of 1930 because of fraudulent, grossly negligent or negligent acts in their importation. To bring such an action one would have to be an "interested party who shall be injured in his business or property by reason of" the importation or sale in question.

The clear intention of this legislation is to provide anti-trust type private relief to companies which believe they have been impacted by imports, without requiring that the complaining parties be able to sustain the burden of proof required by the anti-trust laws.

Before discussing the substance of S.1655, I believe it is important to clearly understand what is at stake here. The United States is the world's foremost trading nation. Even after the deterioration in our trade position of the past several years principally due to the overvalued dollar, the U.S. has maintained its position as the world's leading exporter. Of course we are also the world's leading importer. The importance of international commerce has grown consistently in recent decades in relationship to the size of the U.S. economy as a whole, reflecting the ever-increasing interdependence of the world's economy. The U.S. has been in the forefront in the building of the post-war multilateral

trading system which has made this interdependence possible. Despite misconceptions to the contrary, which are unfortunately often reflected here in the halls of the Congress, the U.S. has been a major beneficiary of this system.

It is therefore incumbent upon us to tread very lightly when considering steps which would contribute to the demise of this system. The legislation before us today would, without question bring international trade to a standstill.

As I noted at the outset AAEI is an organization of importers and exporters. It is from the point of view of the latter that I would like to explain why we believe this legislation is not in the national interest and would have disasterous consequences for the U.S. economy.

Many of those lamenting the decline in international competitiveness of certain U.S. industries tend to portray the U.S. market as the dumping ground for the rest of the world, and to blame this decline on the unfair trade practices of foreign producers. In fact the Judiciary Committee Report accompanying S.1655 states as much. It says-

> "The unlawful dumping of foreign goods, which involves sales in the United States at artificially low prices, has become a serious threat to American industries. Enormous quantities of dumped and subsidized products and articles which violate the customs laws, enter the United States each year."

Leaving aside the veracity of those statements, the impression conveyed is one of the United States as victim. What is never addressed however in the United States as perpetrator. According to data obtained from the Office of the U.S. Trade Representative, in a recent four year period more antidumping investigations were initiated by the world's importing countries against exports from the United States than from any other country, while for 1985 the U.S. ranked second, behind Japan. Amongst the U.S. products recently subjected to antidumping remedies have been battery operated work trucks, monoammonium and diammonium phosphate, outboard motors, urethane prepolymers, photographic printing papers, high voltage porcelain insulators, two-door metal storage cabinets, certain photo albums, abrasive resistant steel pipe, frozen dinners, and charcoal briquets. Action is pending against film laminate, silicon sealants, potatoes, certain oil and gas well castings and polyester yarn.

Are these American producers criminals. Are they acting unlawfully? Are they undermining foreign economies? They are not. Price discrimination in different markets is not and has never been considered under U.S. or international law to be a criminal or unlawful practice. Businessmen worldwide including those here in the United States price in response to the conditions in the markets into which they must sell. If they behave in a predatory way and seek to monopolize trade, they are behaving in an unlawful manner and they are subject to antitrust laws here and abroad, with the criminal and civil penalties attendant to conviction. However antidumping (and countervailing duty) laws are not nor are they permitted under international agreement to be punitive in nature. They are remedial since international price competition, when not predatory, has been considered as healthy and desirable. Only when injurious is it to be corrected by elimination of the discrimination. But penalties are inappropriate since they would stifle competition.

We have no data concerning the frequency with which U.S. products are imported into foreign countries under circumstances which give rise to customs penalties of one sort or another, but we have no reason to believe that U.S. exporters and foreign importers of these products are any less prone to negligence than are American importers and foreign exporters who sell in the U.S. market. Clearly we must anticipate that our products will be treated in the same way as imports into the United States if this legislation is enacted. This is a major concern to American producers, who have more to lose than any foreign producers since as already noted the U.S. is the worlds leading exporting nation.

Let there be no mistake, sanctions of the kind contained in this bill will cause major disruptions to international commerce. But why, proponents of this measure might ask, shouldn't exporters and importers, whether into the U.S. or foreign markets, be held accountable for the injury caused by their price discrimination and violations of custom law?

In the first place they are accountable under certain carefully prescribed limits contained in international agreement. Permitted remedies are limited in order to prevent unilaterally imposed remedies from becoming unregulated non-tariff barriers which stifle trade and upset the delicately balanced array of commitments and benefits under the unilateral trading system.

Thus responses to "dumping," that is sales at less than fair value which cause material injury, are limited by Article VI of the GATT itself and the Antidumping Code subsequently negotiated under its authority. GATT Article VIII limits penalties which may be imposed regarding customs formalities. The existing antidumping

laws and customs penalty procedures of the U.S. are extremely effective and can have profound effects on commerce, while operating for the most part within the limits imposed by the multilateral trading system. Attempts by proponents of S.1655 to argue that damages to private parties and injunctive relief, as provided for in the bill, do not constitute violations of U.S. obligations under these agreements are not persuasive. U.S. exporters will certainly consider "damages" to foreign companies for failure to properly document an entry as a penalty regardless of the fact that it is not paid into the treasury of a foreign government. All of the executive branch agencies principally concerned with international trade have clearly stated that S.1655 violates the international obligations of the U.S. in numerous ways. We will not repeat their positions here. (See letters of Ambassador Clayton Yeutter, U.S. Trade Representative; Robert Kemmit, General Counsel, Department of Treasury; John R. Bolton, Assistant Attorney General, Department of Justice; Douglas A. Riggs, General Counsel, Department of Commerce, included in Senate Report 99-295, Report of the Committee on the Judiciary, accompanying S.1655.) Clearly however the committee must consider these views as compelling with regard to this question.

Leaving aside for the sake of argument the compatibility of the proposed sanctions with the GATT, injunctive relief and damages should not be available as a remedy under the circumstances set forth in S.1655 for dumping and violation of customs laws as a matter of sound economic policy and equity.

S.1655 is based on the presumption that competition from imports should be treated differently than other competition. This is contrary to the concept of "national treatment," a cornerstone of the modern trading system which guarantees that all producers, no matter where located will have the same opportunity to compete for a national market. The principle of national treatment is imbedded in our international obligations through Article III of GATT and a myriad of bilateral commercial treaties. It is critical to American exporters and multinational corporations operating in countries all over the world. The United States, as other countries, maintains an array of antitrust laws to protect the domestic marketplace from unfair trade practices, including predatory pricing practices from all sources. It was to clear up any possibility that imports which were predatorily priced might not be subject to these laws that Section 801 of the Revenue Act of 1916 (15 U.S.C. § 72, often referred to as the Antidumping Act of 1916) was enacted. In addition both the Sherman Act (15 U.S.C. §§ 1 and 2) and the Wilson Tariff Act (15 U.S.C. § 8) clearly cover imports. If there is some question as to whether imported products are subject to the U.S. anti-trust laws then clearly the Congress should consider appropriate amendments.

But just as clearly S.1655 is not such an amendment. It differs significantly in both substance and procedure from the laws which cover domestic commerce and would therefore create a situation in which there were more stingent restrictions on import competition than domestic competition in the U.S. market place.

S. 1655 has no requirement for a showing of intent. Those involved in international commerce would be acting unlawfully and be vulnerable for damages and subject to injunctive relief without any showing that they intended to injure a U.S. industry, or to restrain or monopolize trade. Furthermore there is no requirement in the legislation for a showing that the acts in question had the effect of monopolizing or restraining trade, or indeed had any impact at all upon competition in the U.S. market. In addition administrative determinations by the U.S. Department of Commerce and the International Trade Commission would be given prima facie effect in establishing the elements of sales at less than fair value and injury, despite the fact that procedures before those agencies do not afford parties - most particularly foreign manufacturers, importers and exporters - the full range of rights available in adjudicative proceedings conducted under the Administrative Procedures Act or the Federal Rules of Civil Procedure. Discovery and cross-examination are unavailable, as are the affirmative defenses and counter claims available in antitrust proceedings.

American manufacturers and exporters would surely object vigorously if they were denied the procedural safeguards and evidentuary rules applicable in foreign courts for normal civil actions in those courts, where their competitors sought damages for violations of dumping and customs laws, yet that is precisely the situation which would be created in the United States by S.1655.

It appears that the draconian penalties to be imposed, whether damages or injunctive relief embargoing imports, are particulary severe given the degree of culpability required for imposition of those penalties. Mere negligence on the part of a junior employee in completing customs entry documents would be sufficient to be actionable under the bill. And insofar as dumping is concerned, it is often difficult or impossible for a foreign manufacturer, exporter or importer to know before the fact whether importations are at less than fair value. The calculation of foreign market value, and the adjustments to it and to U.S. price by the U.S. Commerce Department are unpredictable at best. The requirement that home market sales be at prices above fully allocated cost, (not marginal cost) and the use of the highly arbitrary constructed value as a substitute for such sales when they are not above fully allocated cost, can create substantial dumping margins, even where businessmen are behaving in an ethical and economically rational way. Similarly importers may

have no knowledge of costs or prices in the home market or third courtries.

This element of unpredictability must be coupled with the potential assessment of very significant damages and the possibility of a sudden and total ban on further importations to fully appreciate the stifling and anticompetitive effect this legislation would have on international commerce.

Those who may be liable have no way of knowing if they are violating the law before the fact. They also have no guidance for determining what damages may be assessed against them. Certainly the legislation provides no insight as to how the court should calculate the damages to an individual domestic producer, who is only indirectly and marginally affected, attributable to negligence by an importer in making a customs entry. Any relationship between the violation and the financial situation of the domestic "interested party" is likely to be tenuous at best. Calculation of damages will be even more difficult in dumping situations, since an administrative determination of material injury by the ITC, which requires almost no nexus between the less than fair value sales and the injury, will lift from the plaintiff any requirement that he show that he has been injured. Presumably every producer in the domestic industry producing a like product found to have been dumped could recover, whether or not he participated in the administrative proceedings before ITC and the Department of Commerce.

No businessman can afford to face such uncertainties. Price competition from imports would simply disappear for a wide variety of products, with a resulting significant increase in U.S. prices. Retaliatory action by our trading partners in the form of similar legislation would be inevitable almost immediately. The end result would probably be the creation of a series of international cartels to set the prices of widely traded products so as to avoid legal actions, or to resolve by "out of court settlements" those already initiated, by setting minimum prices or quantitative limitations for the products concerned.

AAEI can think of no more anticompetitive legislation than this. The U.S. economy, and those of the other major trading nations of the world would suffer with little if any beneficial effects other than, as usual, to the legal profession.

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STATEMENT OF GARY HORLICK, PARTNER, O'MELVENY & MYERS, WASHINGTON, DC

Mr. HORLICK. Thank you, Mr. Chairman. I should state that these are my own opinions. I represent clients on both sides of import fights, and these are not their views.

The panel just previous to us stated some very good reasons why there should be a private remedy against unfair or predatory trading practices. There are no good reasons, however, for limiting it only to imports; and that is the crux of the problem. If there is something unfair going on, it should be punished whether it is being done by domestic companies or foreign companies. If it is indeed a commercial tort, it is a commercial tort no matter who does it presumably. Dumping under title VII, the administrative remedy, covers much more than sales from a protected home market; and most of the lawyers in this room have been through many cases that would prove that.

Just to give you an example, sales below fully allocated costs often depend on a number of factors, but as your example pointed out, it is often rational business practice for a large chemical company, or indeed a large steel company, to make some sales below their fully allocated cost. I add a favorite technical note that the idea of applying this proposed to nonmarket economy dumpers is too ludicrous to explore.

That is the core problem with the Specter bill, though. It says that only imports can act unfairly. If there is an unfair practice going on, it should be penalized equally, no matter who does it. The second problem which you have heard, I suspect, is this question of national treatment, which would violate not only the GATT, but also a whole web of our commercial treaties with countries and frankly it just begs for retaliation.

I went through the list of the EC and Canadian antidumping findings against U.S. companies over the last few years. A random selection includes Allied Chemical, J. P. Stevens, Dow Chemical, Teneco, Sun Petroleum, Exxon, Shell Chemical, Burlington Industries, Reliance Electric, Western Potato Growers of the U.S., and so on. I don't think those companies want to be subject to this kind of law overseas.

In conclusion, what you are looking at is a series of economic laws. The purpose of our trade laws is to improve the economic interests of the U.S. as a whole. We are not here to try to save the whole world economy nor a few special interests. So, the question is: If you have a business practice which is economically unfair, by definition it must be in the economic interests of the United States to suppress it, no matter who does it.

And as I said, the failure of the Specter bill is only to look at one side of that. Thank you.

Senator HEINZ. Mr. Horlick, thank you.

[The prepared written statement of Mr. Horlick follows:]

STATEMENT

OF

GARY N. HORLICK

BEFORE THE

SENATE COMMITTEE ON FINANCE

July 18, 1986

-- A private right of action against predatory pricing or other unfair trading practices is not unreasonable. Such a remedy must meet two tests, however.

1. The first test is that such a right of action must be based on an economically sound standard. The current U.S. antidumping law makes no sense at all economically.

   It is debatable whether sales in an export market at less than in the home market should be considered an unfair trading practice.

   Certainly sales below fully allocated cost of production are not necessarily considered an unfair trading practice in the U.S., yet they are covered by our current antidumping law.

2. The second test is that the same rules be applied to domestically produced goods and foreign goods. Failure to do so not only violates the basic principle of "national treatment" found in many of our commercial treaties and the GATT, but begs for retaliation. U.S. companies which have been found dumping in the EC alone over the past five years include Allied Chemical, J. P. Stevens & Company, Dow Chemical Company, Tenneco, Sun Petroleum Products, Exxon, Shell Chemical and Burlington Industries. On a world wide basis, U.S. exports are the subject of more antidumping complaints than those of any other country.

-- The purpose of U.S. trade law is to further the economic interests of the United States -- not the economic interests of the rest of the world, and not the economic interests of special interests in the United States at the expense of the general welfare. There may be some national security reasons occasionally for either granting protection or denying it, but that presumably is not at issue in connection with a private right of action (which assumes that judges will not apply such exceptions). A trade law which does not meet the two tests above is probably not in our economic interest.

Senator HEINZ. The threshold question to me—and Mr. Black started off by saying that he thought there did need to be some improvements in the way our laws against dumping worked—is: Are we satisfied with the way current law works? The previous panel testified as to lengthy delays. How do we deal with the fact that it is getting easier and easier to mobilize—and it is often the Japanese—for a country to mobilize in a specific market segment, ship in the back-breaking amount of 64 K electronics, put the industry out of business there; and then, what is left of the industry moves on up to 256 K at least for a while, you know, for another 6 to 12 to 24 months until the same thing happens to them then.

And you look back and you see that 100 percent or 95 percent of the rest of the market is all NEC microcircuitry. Clearly, our current laws aren't working. What do we do?

Mr. HORLICK. The problem that you are referring to, I think, was actually identified by Alan Wolff, and is one of strategic pricing behavior, and it has been alleged in past antitrust cases in the United States that U.S. companies have done the same thing, indeed with phantom models. So, you have a problem that is one of strategic business behavior. If you want to penalize it, fine; and the private right of action is a good way to do it. I simply—at the risk of being repetitious—point out that it is not limited to necessarily a foreign company. If you want the dumping laws to serve that purpose——

Senator HEINZ. Strategic pricing behavior is, under some circumstances, if I recollect what little law I was exposed to at the Harvard Business School, illegal.

Mr. HORLICK. Some is illegal——

Senator HEINZ. In the United States, by U.S. companies.

Mr. HORLICK. Some is illegal; some isn't. If they have a case, those laws should apply to foreigners as well as domestic companies. I don't think anyone here could object to that.

Mr. SUCHMAN. As a matter of fact, the 1916 act was passed because there was some question whether the Clayton Act applied to imports, and it cleared that up. The difficulty is in meeting the tests of predatory pricing nad intent, but that is a problem in domestic law and it ought to be the same standard for imports. One of the difficulties, Senator, is that there is——

Senator HEINZ. But the Robinson-Patman Act applies to strategic pricing.

Mr. HORLICK. It does not apply to imports.

Senator HEINZ. But does not apply to imports. What is wrong with simply extending Robinson-Patman to imports and giving a private right of action as well?

Mr. BLACK. We do not have an objection to that there multilateral action. We are saying there is a problem that needs to be solved, but unilateral U.S. action does cause us problems. The intent of the 1916 act is not a problem for us.

Senator HEINZ. So, your concern is not so much with the principle of doing something; it is with doing something that would not be found to be prima facie illegal and violative of national treatment concepts under the GATT?

Mr. BLACK. Doing something which doesn't have other severe adverse economic consequences, which the private right of action pro-

posals clearly do have in our view. The concept of multiple offenders has less severe collateral consequences.

Senator HEINZ. I am not a lawyer, but it is not clear to me why, if you permit a private right of action for multiple offenders and a sure, swift sword of justice there, that it is any different, whether they have offended once or many times.

Mr. BLACK. I am not suggesting a private right of action for multiple offenders. I think there are remedies for in the Government action context, but not as a private right.

Mr. SUCHMAN. Senator, I think there are some severe difficulties with this multiple offender concept because, as I think the administration witnesses indicated, it is very difficult, given the complexity of the U.S. antidumping law, for anybody to know ahead of time whether they are guilty of—shouldn't use the word guilty because it is not a criminal act—but whether they have transgressed the dumping laws. I can see that anybody who is trading extensively in the United States with a large array of products could quite easily be guilty—again the wrong word—a number of times. Furthermore, any major importer into the United States is going to be assessed a negligence penalty by the Customs Service innumerable times during the year simply because employees fill out the wrong line on a piece of paper.

Are they then to be subject to treble damages or injunctive relief?

Senator HEINZ. I think you are raising kind of a threshold question, with a small "t"—you know, threshold of an infraction issue, and I wouldn't lean too heavily on that in the time available for discussion. Clearly, there are issues like that that are in a sense technical and can be addressed, but I think the big picture question is: What can we do about a problem where our laws are very slow, cumbersome, and uncertain in their operation, even when practice is fairly clear?

Our time has expired, but if someone has a pressing, telling comment that they want to add at this point, I won't foreclose them.

Mr. HORLICK. I would suggest that you learned more in business school than we did in law school about the type of behavior that is at issue here.

Senator HEINZ. Thank you, I guess. [Laughter.]

When I was in business school, we didn't have this kind of foreign competition. Thank you, gentlemen, very much.

Our last panel is John Greenwald and William Outman. Mr. Greenwald, please proceed.

STATEMENT OF JOHN D. GREENWALD, PARTNER, WILMER, CUTLER & PICKERING, WASHINGTON, DC; ON BEHALF OF RMI CO. AND THE AMERICAN TEXTILE MANUFACTURERS INSTITUTE

Mr. GREENWALD. Thank you, Mr. Chairman. The testimony I am presenting today will be limited solely to section 5 of S. 1655. The views are my own, but are also shared by the American Textile Manufacturers Institute and RMI Co. a producer of titanium products in Niles, OH.

I believe that there is a real need for private right of action to redress injury caused by Customs fraud. Customs fraud is a growing problem with which the Customs Service, despite the best will in the world, has been unable to cope with. While Customs is clearly committed to act vigorously against fraud, it does not have the resources to do the job that should be done, nor does it appear likely to receive them. The best way of illustrating the point is to take an example that occurred recently.

On July 1, the Customs Service announced that it had uncovered a scheme under which 50 to 80 million square yards of lightweight polyester filament fabric was illegally imported into the United States from Japan. I had represented producers of lightweight polyester filament fabric in a dumping case a few years ago and can give you first-hand testimony as to the injury that they faced. While this fraud was going on, a number of those U.S. companies have been forced to leave the market. The announcement on July 1 that something had been uncovered was heartwarming, I suppose, but from the point of view of those companies that left the industry, far too late and does absolutely nothing to redress real damage done to U.S. producers by Customs fraud.

I cannot see how anybody—and by this, I really mean the administration—can oppose the proposition that there should be a private right of action to redress injury caused by fraudulently entered imports. The fraud is criminal. The concern is not just one of the U.S. Government enforcing the Customs laws but rather, also, of a U.S. industry that is very often very directly impacted by the fraudulently entered imports.

Before coming up today, I reviewed some of the administration objections, stated in various letters, to this provision of the bill. The administration contention that a Customs fraud provision would violate the GATT is flat wrong, in my view. As far as I can tell, the administration demonstrates——

Senator HEINZ. We wouldn't want to leave that out of any testimony today, anything that they testify on. That particular objection that something is GATT consistent. I am certain that there is a requirement that any testimony sent up here with respect to any trade issue must have, at least in the small print, that whatever they are talking about is GATT inconsistent.

Mr. GREENWALD. I think it is on their word processor; and in sending up the letters, that is always one objection put in.

The second objection, to wit that Customs fraud iS really an issue between the Government and the foreign producer or the importer, strikes me as demonstrating an awfully smug indifference to the interests of U.S. workers and U.S. industries. Finally, there was an objection by the Justice Department about the potential abuse of private right of action of Customs fraud. I was surprised that the Assistant Attorney General writing the letter did not take the time or effort to mention rule 11 of the Federal Rules of Civil Procedure, which prohibits complaints for harassment and other improper purposes.

Section 5 is not perfect. The sweep of the bill is too broad. I think it is a mistake to include mere negligence in the same section as fraud and gross negligence, but this is what I think you accurately described as a relatively minor threshold issue. If you take care of

this problem, I don't see how anybody can argue with the basic thrust of section 5 of this bill.

Senator HEINZ. I think we are about to hear that. Thank you. Mr. Outman?

[The prepared written statement of Mr. Greenwald follows:]

BEFORE THE COMMITTEE ON FINANCE

UNITED STATES SENATE

TESTIMONY OF

JOHN D. GREENWALD
Wilmer, Cutler & Pickering
Washington, D.C.

In the Hearing to Consider S. 1655,

"THE UNFAIR FOREIGN COMPETITION ACT OF 1985"

July 18, 1986

Mr. Chairman, members of the committee, thank you for inviting me to testify before you today on S. 1655, the "Unfair Foreign Competition Act of 1985." I intend to address my remarks solely to Section 5 of the bill which provides for a private cause of action against customs fraud. The views I will express today are not only my personal views but are also presented on behalf of the American Textile Manufacturers Institute ("ATMI") and RMI Company, a major producer of titanium products with headquarters in Niles, Ohio.

I cannot, for the life of me, understand how anybody who cares about the interests of working Americans and American industry can oppose the basic thrust of Section 5 of this bill. The proposition that a private party injured in its business by

customs fraud should be accorded a right to seek redress against the perpetrators of the fraud seems to me to be unassailable. I cannot believe that any member of this committee would vote to deny U.S. textile producers the right to act against injurious imports of textiles that have entered this country illegally in order to evade a quota. Neither can I believe that any member of this committee would deny a company like RMI the right to seek redress against titanium imports that are fraudulently entered into the United States in order to evade the impact of a hard-won antidumping order on titanium products.

Section 5 of S. 1655 is not perfect -- in my view, it is too broadly drafted. It should not extend to cases of mere negligence. There is a world of difference between negligence, on the one hand, and gross negligence (i.e., reckless disregard for the truth) and fraud on the other. However, the basic provisions of the bill are sorely needed. Let me illustrate the point with an example.

On July 1, the Customs Service published the following item in the Federal Register:

> "Notwithstanding vigorous enforcement measures taken by Customs to enforce quota and visa requirements, large-scale abuses in Japan still exist with respect to shipments from Japan. This is in large part due to various schemes currently used by importers and exporters to circumvent the quota and visa restrictions. One such scheme, the transshipping of textiles and apparel through Japan, and entering it into the U.S. as a

> product of Japan, has resulted in the fraudulent entry of an estimated 50 to 80 million yards of fabric. Under this scheme, goods are imported into a free trade zone and invoiced by the buyer as a product of Japan. They are then exported to the U.S. with a false country of origin marking. Thus, the exporter and importer have successfully circumvented the quota and visa requirements on the merchandise from the actual country of origin."

The fabric involved in this quota evasion scheme was primarily lightweight polyester filament fabric. A few years ago, I represented U.S. producers of lightweight polyester filament fabric in a dumping case against imports from Korea and Japan. I can testify first hand to the trade problems suffered by those producers. The dumping case was brought on behalf of seven U.S. companies which were then in the lightweight polyester filament fabric business; today only four of the seven companies are still producing the fabric. Those 50-80 million square yards of illegal imports were directly responsible for much of the injury suffered by the U.S. industry. The tighter enforcement of customs entry procedures, which is the action announced by the Customs Service in its July 1 notice, is far too little, far too late. A private right of action to redress the damage caused by this sort of customs fraud is the only effective solution to the problem.

What shocks me about the debate on Section 5 of the bill is the position taken by the Administration. During a

period of record trade deficits and, apparently, a record level of customs fraud contributing to the record trade deficit, the Administration has decided to stand four-square with the perpetrators of customs fraud. This truly scandalous position has been justified by the sort of bureaucratic trade-policy babble that increasingly characterizes the Administration's stand on trade issues. Let me quote from two letters on Section 5 of S. 1655 submitted by the Administration to Senator Thurmond.

The first letter, dated February 18, 1986, is from the Honorable Clayton Yeutter, U.S. Trade Representative. He says that "we [this seems to be the imperial "we"] must oppose the customs fraud provision of S. 1655" because:

> ". . . the GATT does not authorize the exclusion of goods because a company has . . . fraudulently encouraged the entry of goods into the United States."

and because

> "[while] the fraudulent entry of goods clearly represents a loss to the United States, [it] is . . . often a good deal less clear whether a fraudulent . . . entry results in direct or foreseeable harm to a private plaintiff."

Somebody has got to call Ambassador Yeutter to account for this sort of drivel. The Ambassador's first objection misconstrues the GATT (and seems to misread the bill). The bill provides for such equitable relief "as may be appropriate" or recovery for damages. It does not require an exclusion of

imports, and should not result in an exclusion of imports that are not fraudulently entered into the United States. Moreover, the prohibition on merchandise involved in fraudulent entry is not a violation of the GATT -- current U.S. trade law already authorizes the Customs Service to refuse entry of products where fraud is involved and requires the exclusion of improperly marked goods. S. 1655, therefore, does no more than current law.

The second objection raised by USTR is, if anything, more irritating still. Does Ambassador Yeutter really want to suggest that a company like RMI has no direct and legitimate interest in pursuing customs fraud which is designed to evade the impact of an antidumping order? Does Ambassador Yeutter really mean to say that U.S. textile producers have not been injured by the massive fraud that has been practiced in order to evade textile quotas? If so, the USTR position belies everything that this Administration has said about its "commitment" to "vigorous enforcement" of U.S. trade laws.

The second "objections" letter I want to quote from was sent to Senator Thurmond from Assistant Attorney General John Bolton on February 11, 1986. In it, the Justice Department displays a smug indifference to the impact of fraudulently entered imports on U.S. industry. ("The penalties that may be assessed on Section 592 are intended in part to compensate the United States for customs duties it has not received due to false and

fraudulent misstatements of importers. U.S. competitors are only indirectly and marginally affected by this law.") It also raises a new concern about possible "abuse" of Section 5 -- i.e., that it will be used to harass legitimate trade. In raising the prospect of "abuse," Assistant Attorney General Bolton should have taken the trouble to point out that Rule 11 of the Federal Rules of Civil Procedure expressly forbids the invocation of a provision like Section 5 for purposes of harassment or for any other improper purpose. The "abuse" concern is a canard.

This brings me back to the point with which I began. A private right of action against injury caused by customs fraud is much needed and there is no good reason to oppose it. The customs fraud problem is very real, the impact on U.S. industry is major, and the Customs Service, even with the best will in the world, comes at the problem with too little too late.

STATEMENT OF WILLIAM D. OUTMAN, PARTNER, BAKER & McKENZIE, WASHINGTON, DC; ON BEHALF OF THE JOINT INDUSTRY GROUP

Mr. OUTMAN. Thank you, Senator. My name is William Outman. I am a trade lawyer here in Washington with Baker and McKenzie. I appear on behalf of The Joint Industry Group. We have submitted a written statement, which I presume will be in the record. In keeping with the committee's directives we will merely highlight certain points we wish to emphasize at this public hearing.

Before doing so, I would like to note for the record that The Joint Industry Group represents a broad national group of corporations, associations, professional firms, and domestic interests, all of whom are active and on a day to day basis participate in international trade activities, including both import and export activities.

In our written statement, we have noted the bases upon which we object to the proposed amendment to section 801 of the 1916 Antidumping Act. It is my purpose here to bring a bit of balance to what you have just heard from Mr. Greenwald and the textile interests. I think it is fair to say that Mr. Greenwald has suggested that the problems befalling our domestic interests from foreign competition can be cured if we have a private enforcement right.

As we have noted in our written submission, there is no U.S. Government agency, in our judgment, that has any more effective or broad-reaching enforcement powers than the U.S. Customs Service. If there is a problem in enforcement, it is due either to a lack of personnel or incentive. It is not because the laws impede proper enforcement.

Also, in the area of enforcement, the textile and steel interests would have you believe that every import transaction is somehow tainted by false invoicing or unscrupulous activity. This is simply not the case. In those few instances in which the Customs Service has alleged that there are bad apples in the barrel, we have found that these have been ferretted out.

If there is any legitimate concern, we submit that it is in ensuring that the enforcement activities do not go beyond legitimate bounds.

In closing, I should note that the provisions set forth in S. 1655, which we oppose of course, reflect solutions to problems that are themselves worse than the problems.

The Senate must be careful not to fall into the trap that the House now finds itself in having adopted H.R. 4800. In that measure, which also contains a provision comparable to section 3 of S. 1655, we find in section 175 scofflaw penalties for multiple Customs law offenders, a subject which has been discussed quite a bit here this morning. Without benefit of hearing, the House has ordained that a multiple Customs law offender should be barred from importing merchandise into the United States. Such an offender is one having three separate violations involving gross negligence, fraud, or criminal activity within a 7-year period.

Anyone familiar with Customs law recognizes that a substantial segment of domestic industry would, if such a measure were adopted, be placed out of business. The Customs Service's random and often indiscriminate use of the concept of gross negligence, coupled

with the multitude of import transactions occurring daily, makes the possibility of achieving multiple Customs law offenders status about as difficult as falling off of the proverbial log.

There has also been quite a bit of discussion here this morning about speed in remedy. I would submit that those who advocate speed and suggest at the same time that this is to be achieved in the courts have not engaged in litigation—certainly not recently.

Time does not permit me to elaborate on all the reasons underlying domestic business concerns that these measures may, in a protectionist flurry, somehow be adopted to solve our problems. Nonetheless, having practiced trade law here in Washington for a little more than 20 years, if you or the staff have any questions, we will be pleased to elaborate on them. Again, on behalf of The Joint Industry Group, may I thank you for the opportunity to testify.

[The prepared written statement of Mr. Outman follows:]

STATEMENT OF WILLIAM D. OUTMAN, II
ON BEHALF OF THE JOINT INDUSTRY GROUP
BEFORE THE SENATE COMMITTEE ON FINANCE
JULY 18, 1986

Mr. Chairman and Members of the Committee:

My name is William D. Outman, II. I am a member of the law firm of Baker & McKenzie, resident here in Washington. I appear today on behalf of the Joint Industry Group, a coalition of seventy-five trade associations, businesses and law firms and other professional organizations actively involved in international trade, to register our firm opposition to the proposals contained in S. 1655. A description of the Joint Industry Group, together with a listing of its members, is attached for your reference.

The Group is opposed to the adoption of S. 1655 for many reasons, which are discussed below. There is, however, an even more essential basis upon which the Senate must determine not to adopt S. 1655. This measure seeks to grant to the private sector (and arguably only limited beneficiaries) the right to seek private monetary recompense and equitable relief for actions already remedied by the United States Government. We find this to be overreaching and to contain elements that some could say would have an in terrorem effect on U.S. business interests. Our concerns in this regard are elaborated below.

Proposed Amendments To Section 801 Of The Act of September 8, 1916, 15 U.S.C. § 72

Section 3.(a)* of S. 1655 would revise the Antidumping Act of 1916 in such a substantial fashion as to transform an antitrust statute into one imposing liability for pricing conduct already controlled under the administrative Antidumping Law currently set forth at 19 U.S.C. §§ 1673-1677g (the "Antidumping Act"). The temptation to initiate a dumping action with the prospect, however remote, of becoming entitled to bring an action under proposed section 801(B) would create an onslaught of administrative antidumping filings unparalleled in the United States. The Group finds there to be little merit in the creation of a legal right that seems to serve no public interest.

As presently drafted, proposed section 801(A) mandates that "no person shall import or sell within the United States any [dumped] article. . . ." On its face, it is not clear at what point in time this prohibition takes effect. For example, if an article manufactured in Japan in January, 1986 is imported into the United States and sold prior to

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* As originally proposed in 1983, S. 418 contained three sections, one of which had two subsections. Subsection (b) of the 1983 measure is now set forth in section 4 of S. 1655. As such, this subsection a reference should be deleted. Also, the end quote mark on line 20, page 6 should properly appear at the end of line 4, page 7 followed by a period.

the highly technical, and time consuming, determination that it was sold at a United States price which was less than the foreign market value of a class or kind of merchandise, it would seem that both the importation and sale would constitute a violation of section 801(A). Although this result may not be intended, if this provision is adopted we will have as the law of the land a prohibition on conduct that cannot be foreseen or determined with any measured degree of accuracy.

Section 801(A) is equally deficient with regard to merchandise that may be imported after a finding of dumping under the Antidumping Act. The mere fact that an article was imported and found during the period of investigation to have been sold in the United States at less-than-fair value is absolutely no indication that the article will, at a future date, be sold to the United States at a price which is less than the foreign market or constructed value of such article. Again, it is not possible to determine whether, and if, the proposed law will have effect. The disruption caused by the adoption of a measure such as proposed section 801(A) cannot be measured in any meaningful fashion. As long as the prohibition could extend either forward in time prior to any final determination of dumping and then well after that date, it would create an aura of uncertainty

which no importer or seller of foreign produced merchandise could risk or necessarily endure.

Under proposed section 801(B), any interested party, a term not specifically defined and presumed to be given the broadest possible meaning, would be entitled to bring a civil action against "any manufacturer or exporter of such article or any importer of such article into the United States who is related to such manufacturer or exporter." As a practical matter, notwithstanding the extraterritorial reach intended to be extended by proposed section 801(F), the foreign manufacturers or exporters of such articles are probably beyond the effective pale of U.S. jurisdiction. The remaining "deep", if not "sole", pocket is a "related importer" of such article. It is presumed that such related importer would be any individual owning, controlling or holding as little as 5% or more of the outstanding voting stock or shares of any organization and such organization. See 19 U.S.C. § 1677(B)(e)(3) and 19 U.S.C. § 1401a(g)(1). The party having the least control, therefore, would appear to be saddled with the highest risk of exposure.

On the other hand, if a foreign manufacturer of an article chose to sell the article to an unrelated party in the United States at an intentionally dumped price, the importation or resale of that dumped product in the United States may be prohibited under section 801(A). While the

manufacturer or exporter would be subject to the institution of a civil suit under proposed section 801(B), the unrelated importer would not. We would appear to have, therefore, a situation in which a manufacturer or exporter would be beyond the effective reach of the U.S. legal system and the importer would not be subject to institution of any legal action under subsection (B). Again, this merely points to the confusion and uncertainty that could be expected to follow if this measure were adopted.

Proposed subsection (C) causes the Group substantial concern. Under the Antidumping Act as presently administered, any unfair pricing, and hence the presumed cause of any material injury, is remedied by the restoration to the United States (in the form of duties) of whatever amount constituted unfair pricing. The remedy may not be perfect, and it may take time to achieve the desired result. The proposed measure, however, would go far beyond any form of "remedy" and create the right to seek enjoying further importation into, or the sale or distribution within, the United States by such defendant of the articles in question. We find no basis upon which to tie future conduct to past action, especially if the future imports are fairly priced and sold.

Monetary damages would also be contemplated as would the recovery of reasonable attorney's fees. If adopted into

law, every dumping action would be commenced with the prospects of threatening foreign competition, whether priced fairly or not, with the potential for a four-fold legal whammy. An action would be filed under the Antidumping Act with expectation of seeking an injunction, monetary damages and all attorney's fees. Section 801 would, in a single stroke, be transformed from a measure designed to prevent unfair competition into a sword threatening all forms of competition from sources without the United States. We are opposed to this measure because of this in terrorem effect.

In proposed subsection 801(D), any interested party can either establish independently the elements set forth in proposed subsection (A) or rely on a final determination under section 735 of the Tariff Act of 1930, 19 U.S.C. § 1673d. Unquestionably, few interested parties will seek to establish the elements set forth in subsection (A) independently. As presently drafted, proposed subsection (D) requires that an interested party obtain a "final determination" adverse to the defendant by the Department of Commerce or the International Trade Commission. If there is a determination by the Department of Commerce (referred to under the Antidumping Act as the administering authority) of sales at less-than-fair value and the International Trade Commission makes a final determination that an industry in the United States has not been materially injured, we seem to

have a "final determination adverse to the defendant." Is the plaintiff able to pursue the civil action in court a having made a prima facie showing? The law is not clear. Alternatively, there is nothing in proposed subsection (D) to suggest that if there were no finding of dumping under the Antidumping Act through the traditional mechanism, a plaintiff could still attempt to make a prima facie showing of the elements in subsection (A), thereby being entitled to recover damages for injury sustained even in the absence of a formal finding of dumping. Again, these possibilities underlie the confusion that is certainly to abound if this proposed measure is adopted.

Finally, under proposed subsection (H), we find it to be an unwarranted breach of due process that a defendant in any action brought under subsection (B), which would include foreign manufacturers, producers or exporters, could be faced with the denial of rights to sell products in the United States for failing to comply with discovery orders or other orders or decrees of the court.

For the reasons specifically noted above as well as those that have been expressed by others, opposed to this measure, including the Administration, the Joint Industry Group urges that the Committee not report favorably the proposed creation of the right to provide private enforcement of what was formerly an antitrust statute. The opportuni-

ties for abuse are legion, the terms are fraught with technical uncertainty and the benefits to the United States are of questionable magnitude. It is not the type of law on which the Senate Committee on Finance should put its imprimatur.

Private Enforcement Action

Section 5 of S. 1655 proposes to amend Title 28 of the U.S. Code to provide for the creation of the right to a private enforcement action by "any interested party" who claims to be injured in his business by a fraudulent, grossly negligent or negligent violation of section 592(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 ("section 592"). The Joint Industry Group is extremely concerned regarding, and wishes to register its unalterable opposition to, this proposal.

To begin, if a person violates section 592, a right has been vested in the U.S. Government under present law to seek the imposition of a civil penalty. In the case of fraud, the civil penalty is extreme and can go as high as the domestic value of the merchandise in issue. Under existing Customs Service practice, the domestic value of the merchandise includes not only its appraised value but also the duties properly owing thereon. If this were placed in the context of an income tax violation, it would be tantamount to vesting in the Government the right to seek a civil pen-

alty equal to an individual's entire adjusted gross income (perhaps even his gross income) as well as the tax owing thereon. The institution of such an action for fraud can be commenced at any time within five years of the date of discovery of the violation. There is no other governmental agency that has any more effective tool than section 592 upon which to discourage fraudulent activity within its sphere of regulatory authority. The proposal to create a separate enforcement right is clearly unnecessary.

In the case of gross negligence, the Customs Service can seek monetary penalties equal to the lesser of the domestic value of the merchandise or four times the lawful duties of which the United States is or may be deprived. Even if the violation did not involve the assessment of duties, civil penalties of up to 40% of the dutiable value of the merchandise can be assessed. Again, in the income tax arena, the Internal Revenue Service can treat tax violations for gross negligence in no more severe a fashion than they can for ordinarily negligent violations. We submit, therefore, that section 592 provides a very effective deterrent against all egregious failures to comply with the Customs laws of the United States.

Against this background, we find a proposal to create a private enforcement in any interested party, with the civil action to be brought in the District Court for the District

of Columbia or in the Court of International Trade. The plaintiff's sole burden seems to prove he has been damaged because another party violated U.S. law. We find it difficult to translate the violation into damages, and a few illustrations can serve to show how the creation of this private right can only serve to disrupt normal business patterns at no benefit to the U.S. Government or to the public which is intended to be served were such provision adopted.

As can be established by Customs Service records, most violations of section 592 do not involve fraudulent actions or even those that are considered to be grossly negligent. In addition, actions brought under section 592 are seldom contemporaneous with the occurrence of the event being challenged. It is not uncommon for the Customs Service, through audit or other examination done after the time of importation, to determine that certain conduct of an importer has fallen below an accepted standard. Under the procedures set forth in section 592, following the completion of an investigation, the Customs Service may elect to issue a prepenalty notice. In due course, this may mature into a penalty claim and ultimately be resolved through an administrative settlement in which the importer agrees to restore any alleged loss of duties as well as to provide the Customs Service with some recompense in the form of a monetary penalty. Only rarely do enforcement actions under section 592 ever

reach the courts. This means in all likelihood that resolution of a section 592 action may occur anywhere from two to five years following the import activity in issue. If it is resolved administratively, there is no publicity as to the imposition of the monetary penalty. In the circumstances, there is considerable doubt that the "interested party" will know of the violation of section 592. Furthermore, it would seem virtuely impossible for him to prove damage by such violation.

The Group also questions why the proponents of the creation of this private enforcement action right would seek to vest the interested party with authority to seek equitable relief including the imposition of injunction against further importation into the United States of the articles or product in question. For a violation of section 592 to have occurred, the conduct in issue must have occurred at sometime in the past, perhaps distantly so. It is illogical to presume that a person who has been charged with a commission of a fraudulent, grossly negligent or negligent violation of section 592 will continue this conduct during (i) the investigation, (ii) the administrative settlement period or (iii) beyond. The proposal, however, would grant the private party the right to seek to enjoin future imports. We find no basis upon which to deny import activity if it does

not violate U.S. law. The grant of equitable relief, therefore, is unwarranted.

It is also difficult for the Joint Industry Group to contemplate what monetary damages could be covered and how they would relate to the "injuries sustained." Should an importer fraudulently undervalue or misdescribe merchandise in order to gain an economic advantage at the expense of a U.S. competitor, and the Customs Service pursues its remedies under section 592 in the same fashion as it has done in the past several years, the Government will seek restitution of the maximum civil penalties allowable under law. In the case of the fraudulent importer, the Customs Service will, presuming it is successful under section 592, have obtained monetary penalties from the importer equal to the full value of, or a high multiple of the loss of revenue associated with, the merchandise. The "benefits" the party sought to gain will more than be offset. That is the way the law should operate if it is the Government, acting on behalf of the public, that is vested with the enforcement right and authority.

The Joint Industry Group members also believe the Customs Service can better administer its laws if the down stream threat of institution of a private action does not color how an importer views resolution of disputes with the Customs Service. For example, in many instances the Customs

Service will seek imposition of monetary penalties alleging gross negligence. During the course of an administrative settlement, the importer and the Customs Service will both recognize that resolution of the matter at some lesser level will serve either their mutual interests. If the importer must then be concerned that settlement of a penalty action will still leave it exposed to the institution of some civil action in the Court of International Trade, the administrative settlement procedures will be severely compromised. The Customs Service's view on this should be sought if not already on the record.

As a final comment, the definition of "interested party" is unnecessarily broad. In many applications, wood competes with steel which competes with aluminum which competes with plastic. If there were to be a fraudulent violation by a steel importer, it would seem that the interested party definition would entitle domestic manufacturers, producers or wholesalers of wood, aluminum, steel and plastic to bring suit alleging damages. Further, there would be nothing on the face of the proposed statutory definition to preclude a Japanese wholesaler in the United States from joining the foray. We question how this grant of authority to such a broad range of parties will improve Customs administration or correct any deficiencies under existing law.

For the diverse technical and substantive reasons discussed above, the Joint Industry Group reiterates its strong opposition to the proposed adoption of section 5 of S. 1655.

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Should the Members, their staffs or the staff of the Committee on Finance have any questions or requests of the Joint Industry Group concerning our testimony, we will be pleased to furnish additional information to you. On behalf of Kenneth A. Kumm, Chairman of the Joint Industry Group, and its members, we appreciated the opportunity to appear before the Committee in its consideration of this legislation. Hopefully the comments we have expressed will convince you of the lack of merit in the proposal before the Committee.

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Senator HEINZ. Mr. Outman, thank you. There is something you said that I don't understand. On the one hand, you say there is no problem; on the other, you say if there is a private right of action, a substantial segment of your industry would be out of business because they would repeatedly fail the gross negligence or fraud test. Now, how can there be no problem; yet this legislation be so dangerous? The test of gross negligence is no small test.

Mr. OUTMAN. The test of gross negligence is no small one. As we note in our written presentation, oftentimes mindful of settlement negotiations, the Customs Service will bring an action; they will start off alleging fraud, and then it will be downgraded perhaps to gross negligence and perhaps in due course to negligence. I have recommended to many clients that they accept the penalty settlement in exchange for a low multiple of loss of revenue. The Customs Service gets an allegation of gross negligence; we get a lower multiple, both———

Senator HEINZ. But presumably, the reason they are going for gross negligence is that, if they had prosecuted the case, they might have gotten something worse.

Mr. OUTMAN. Senator, the one thing I should point out is that many of my clients are those that Mr. Wolff talked about. I represent major, domestic semiconductor companies in Customs practice, and I have had quite a bit of experience representing them before the Customs Service. These are not foreign companies. There are not foreign interests. These are U.S. companies that have problems with technical interpretations of technical law. In my file, there are Customs entries, sometimes daily, sometimes in 10 different ports. It is like filing on an individual basis perhaps 200 to 400 tax returns a year.

Senator HEINZ. The other point you make is that Customs fraud is really only a fraud against the U.S. Government. Isn't that why you are basically opposed to this?

Mr. OUTMAN. We are opposed, Senator——

Senator HEINZ. Isn't that an essential element of your opposition?

Mr. OUTMAN. It is difficult to determine the nexus between the allegation or the settlement of a case alleging gross negligence or fraud, and translating that into the private right of action.

Senator HEINZ. Who does the fraud hurt? Does it hurt the U.S. Government?

Mr. OUTMAN. Senator, it would obviously hurt the public, and that is the reason we have the law on the books. I have had difficulty in submitting the written submission as to how do you translate that fraud or that gross negligence into a private right of action?

Senator HEINZ. If a doctor operates on me for an appendicitis and makes a mistake and takes out my heart, if they can find it——

Mr. OUTMAN. I was going to mention that. [Laughter.]

Senator HEINZ. They have committed a form of malpractice. They have also lied to me that they were going to take out my appendix, but they did something else. It isn't the hospital where the operation is taking place that suffers. It is me.

Mr. OUTMAN. I would agree.

Senator HEINZ. Should I not have a private right of action?

Mr. OUTMAN. Let's consider this thing in the context of trade. If the steel company, as a possible hypothetical example, were injured because of some unfair import activity, and the unfair import activity involved a violation of U.S. law, I would submit that it would probably involve bringing in steel in excess of an allowable amount.

Senator HEINZ. How about just marking it Taiwan when it was coming from Japan?

Mr. OUTMAN. Let's take that as a perfect case in point. It is marked Taiwan——

Senator HEINZ. By the importer.

Mr. OUTMAN. By the importer, and we will presume that it doesn't involve quota; it doesn't involve any form of unfair pricing.

Senator HEINZ. No, let's assume that it did involve getting around a quota.

Mr. OUTMAN. All right. Now, you have the instance in which there has been a sale that could not have taken place but for this subterfuge, and this would not be inadvertent. I would agree with you.

So, now the steel company stands charged by the Customs Service with having violated U.S. law. The U.S. Customs Service, under pressure from among others the Congress and your office in particular, will go out of its way to ensure that this particular matter is handled as fairly but severely as possible.

Senator HEINZ. But why shouldn't the injured party or parties have a private right of action? They are the people who are being hurt by what is clearly fraud.

Mr. OUTMAN. I guess, Senator, the one thing we have here—and one of the earlier witnesses talked about the baby and the wash water—maybe if that is the specific problem, we ought to get the Customs Service or perhaps your constituency to help you document what is the real problem. Perhaps, steel ought to have a special remedy, but we represent numerous companies that get charged with fraud and they have nothing to do with steel. It is not a specific injury. Mr. Greenwald, no doubt representing the textile industry, has a comment.

Mr. GREENWALD. What I would suggest, if I might for just a minute, in response to Mr. Outman, is that the law itself requires a showing of injury. You don't get your remedy unless you prove your injury. Therefore, the law has self-contained limits in it. I can't see the basis for the objection.

Senator HEINZ. Gentlemen, your testimony has all been very helpful. Thank you very much.

[Whereupon, at 11:45 a.m., the hearing was adjourned.]

[By direction of the chairman the following communications were made a part of the hearing record:]

REPORT OF THE ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION ON S. 1655

INTRODUCTION

In this Report, the Antitrust Section of the American Bar Association submits its comments concerning S. 1655, a bill which would amend the so-called Antidumping Act of 1916 (15 U.S.C. § 1672). We believe that S. 1655 raises serious questions concerning antitrust law and policy, and that the bill contains some procedural flaws which should be addressed.

I. BACKGROUND: THE ADMINISTRATIVE REGULATION OF DUMPING

"Dumping" is a term used to describe a practice sometimes occurring in international trade of selling a product in a foreign market for less than it is sold in the producer's home market. See Jackson, World Trade and the Law of GATT, at 332, 402 (1969). Since 1921 (see 42 Stat. 11), the practice has been regulated through the imposition of an antidumping duty on merchandise which is found to have been sold for less in the United States than in the foreign producer's home market, where such pricing has injured or is threatening injury to a U.S. industry producing similar goods. See S. Rep. 96-249 on H.R. 4537 (96th Cong., 1st Sess. 1979) at pp. 60-79.

The U.S. dumping law, extensively revised by the Trade Agreements Act of 1979 (P.L. 96-39, 93 Stat. 144) is now administered jointly by the Department of Commerce and the U.S. International Trade Commission. See 19 U.S.C. 1673 et seq. The Commerce Department's International Trade Administration conducts an investigation to determine whether the subject merchandise is being sold in the United States at "less than fair value," a technical term which usually refers to the price at which similar merchandise is sold in the markets of the country where produced. 19 U.S.C. § 1677b(a). Where sales in that country (the "home market") are non-existent or too small to be meaningful, the law authorizes comparison with sales to a third-country or, where that is not possible, with a "constructed value" based on actual costs of imports, plus overhead and profit margins. Id.

The Commerce Department's pricing investigation typically is of sales occurring during the six-month period preceding the filing of the petition (19 C.F.R. § 353.38), and its objective is to compare prices for export to the U.S. and for sale in the home market (or, if necessary, in a third-country market or under a constructed value approach) on an ex-factory basis. 19 C.F.R. §§ 353.3, 353.5, 353.6, and 353.10. Where a foreign manufacturer maintains its own distribution system in the U.S. so that the first arms-length sale occurs after the goods arrive in the U.S., the price of that sale must be adjusted so that its ex-factory equivalent can be determined.

Other adjustments frequently must be made to the United States and home market prices to account for qualitative factors, such as differences in market conditions or, product composition in the two markets. Such adjustments are necessary when, for example, sales in one market are to distributors and in the other to end-users or, where product servicing or warranties offered in one market are different from those offered in another market. See, generally, 19 C.F.R. §§ 353.1--353.23. See, e.g., Motorcycle Batteries from Taiwan, 47 Fed. Reg. 9264, 9267 (March 4, 1986). The objective of these adjustments is to assure that the U.S. and foreign sales prices being compared are comparable in a commercial sense.

After these adjustments are made, the Department will compare the adjusted ex-factory price of each U.S. sale during the six-month investigation period with the foreign market value of the product (converted to dollars) at the time each U.S. sale is made. Where the foreign sales prices constituting foreign market value fluctuate, or where exchange rates are unstable, the Commerce Department may shape a specific technique to calculate a foreign market value for use in the price comparison. See, e.g., Melamine Chemicals, Inc. v. United States, 732 F.2d 924 (C.A.F.C. 1984). The amount by which the foreign market value exceeds the U.S. price is the amount of dumping margin. By weight-averaging dumping on all sales during the six-month investigation period, the Department derives a single, less than fair value (or dumping) percentage for its investigation. See, e.g., Motorcycle Batteries From Taiwan, 47 Fed. Reg. 9264, 9268 (1982).

If there is a dumping margin greater than 0.5 percent (which the Department considers de minimis), the International Trade Commission will determine whether the dumped imports are injuring or threatening injury to a domestic industry producing a like product, or retarding the establishment of an industry.[1] Under the antidumping law, "injury" can be based on revenue decline, lost sales, declining market share, declining profitability, declining prices or similar phenomena reflecting on the aggregate health of the industry. 19 U.S.C. 1677(7). The law's injury requirements are satisfied if the industry is suffering more than de minimis injury, and if the dumped imports are a cause (not the cause, and not necessarily a cause more important than other causes) of such injury. See, e.g., Maine Potato Council v. United States, 613 F.Supp. 1237, 1243 (Ct. Int'l Trade 1985); British Steel Corp. v. United States, 593 F.Supp. 405, 513 (Ct. Int'l Trade 1984) (countervailing duty case).[2]

If sales at less than fair value exist (as determined by Commerce) and if the ITC determines that the imported products are a cause of material injury to a U.S. industry, or are threatening such injury, the Commerce Department will enter an antidumping order, which will require entries of the merchandise under investigation to bear a provisional antidumping duty (known as a "cash deposit") in the percentage amount previously determined by the Commerce Department. Actual dumping duties are assessed retroactively, beginning on the anniversary of the dumping order, and are based on a review of actual sales prices (in the U.S. and home markets) during the previous 12 months. 19 U.S.C. § 1675(a).

1/ If the Commerce Department finds no dumping or a margin of 0.5 percent or less, the investigation will be dismissed at this stage. (A recent Court of International Trade decision, Carlisle Tire & Rubber Co. v. U.S., No. 84-7-01058, slip. op. (U.S.C.I.T. April 29, 1986), however, questions the Commerce de minimis rule.)

2/ There is controversy among members of the ITC over whether the injury must be attributable to the margin of dumping (e.g., did the price differential allow imports to undersell domestic competitors?), or merely to the presence of the investigated imports in the U.S. market. This difference in analysis is crucial in cases where dumped imports would undersell U.S. producers (and therefore gain market share and depress prices) even if their prices were raised to foreign market value levels. In such cases, proponents of "margin analysis" have argued that dumping is irrelevant to "injury" to the U.S. industry, which would have occurred anyway. ITC Commissioners are split on this issue. Compare Carbon Steel Wire Rod from Brazil, Belgium, France and Venezuela, Inv. Nos. 701-TA-148 through 150 (Preliminary) and 731-TA-88 (Preliminary), 3 ITRD 1976 (U.S.I.T.C. 1982) with Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155, 157-160, 162 (Final), 4 ITRD 2030 (U.S.I.T.C. 1983). What judicial authority there is suggests that the margin of dumping should not be considered in an injury analysis. See Maine Potato Council v. United States, 6 ITRD 2452, 2455 (Ct. Int'l Trade 1985).

II. THE CURRENT PRIVATE CIVIL REMEDY FOR DUMPING AND THE CHANGES PROPOSED BY S. 1655

A. The Antidumping Act of 1916

Since 1916, a civil cause of action for dumping has existed in a section of the Revenue Act of that year, more commonly known as the 1916 Antidumping Act (the "1916 Act"), 15 U.S.C. § 72. While differential pricing in international markets is at the core of both the administrative and civil antidumping statutes, there are significant differences in the two. First, the 1916 Act operates in an in personam manner against any person who imports or assists in importing into the United States articles from a foreign country, and (like most civil remedies) imposes damages for past injuries sustained as a result of the proscribed conduct. The administrative or government remedy, on the other hand, operates as a tariff on imported merchandise, is triggered by past conduct (i.e., the initial investigation period is the six months preceding the filing of a petition), but is prospective in effect.

Second, the statutes differ in terms of the behavior which they proscribe. Under the 1916 Act, differential pricing must be "common and systematic." This provision is not present in the administrative statute, which can be violated by sporadic instances of less than fair value sales during the period of investigation, if the subject imports injure or threaten injury to the domestic industry. See, e.g., Certain Carbon Steel Products from Brazil, 49 Fed. Reg. 28296 (July 11, 1984) (less-than-fair-value finding based on dumped imports which constituted eight percent of respondents' total sales in U.S. market). Also, the differential pricing must be done with predatory or other anticompetitive intent directed to a U.S. industry. Cf., Zenith Radio Corp. v. Matsushita Elec. Ind. Co., Ltd., 723 F.2d 319 (3d Cir. 1983). No comparable intent provision appears in the administrative statute. See, e.g., Fresh Cut Roses from Columbia, 49 F.R. 30765 (1984). The 1916 Act also requires that the price differential be "substantial," which is probably different than the 0.5 percent threshold administratively applied in government antidumping investigations.

B. The Effect of S. 1655 on Current Law

S. 1655 would repeal the provisions of the Antidumping Act of 1916, as described above, and create a new civil cause of action for dumping which would rely on the substantive elements of the government statute (sales at less than fair value causing injury to a domestic industry).[3] While differential pricing between U.S. and foreign markets would remain at the heart of the new civil claim, its specific elements would change significantly.

One important effect of S. 1655 would be the elimination of predatory intent ("the intent of destroying or injuring an industry in the United States, or of restraining or monopolizing any part of the trade and commerce in such articles in the United States" (15 U.S.C. § 72)) as an element of the civil cause of action. Under

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3/ The new law would become one of the "antitrust laws of the United States." While this declaration has little substantive impact on the law, we believe it could create confusion. As the June 17, 1985 comments of the Federal Trade Commission on S. 236 (a predecessor to S. 1655) point out, being part of the "antitrust laws of the United States" means that certain common definitions and procedures of the Clayton Act apply. For example, the Clayton Act governs venue, tolling of the statute of limitations, damages, and standing to sue. 15 U.S.C. § 15, 16, 16b, 22. S. 1655, however, has its own, different provisions governing these concepts. This potential for confusion can be avoided, with no substantive cost to S. 1655, by eliminating the declaration that it is one of the "antitrust laws of the United States."

S. 1655, there would be no requirement that the differential pricing have an anticompetitive purpose or effect. Although the bill would require proof of "injury to a domestic industry" resulting from the dumped imports, such injury may be different from injury to competition; in competition law terms, injury to a domestic industry may be akin to injury to competitors, a phenomenon not of itself protected under the antitrust laws. See Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).[4] While injury to competition and injury to a domestic industry may, in some cases, arise from the same conduct, the two terms are legally different and relate to the different objectives of the antitrust laws (protection of competition) and the antidumping laws (protection of domestic industries).

The absence of any requirement of predatory intent is compounded by S. 1655's substitution of such trade concepts as "constructed value" for the present language of the 1916 Act. The present language, in referring to "actual market value or wholesale price of such articles," effectively limits the Act's application to actual transactions involving commercially interchangeable products. S. 1655, on the other hand, would permit proof of price discrimination by means not only of actual prices for comparable products in the foreign market, but also through comparison with "constructed value" and other highly technical terms, which might result in price comparisons between products not commercially interchangeable.

Second, the type of domestic economic injury which would be redressable under S. 1655 is broader not only than that of the 1916 Act (injury to a domestic industry), but even that of the administrative statute. Under S. 1655, less than fair value sales which cause or threaten injury to industry or to labor[5] in the United States, or which prevent "in whole or in part, the establishment or modernization of an industry" [6] would satisfy the domestic injury element.

Third, the proposed legislation would alter the class of plaintiffs who have standing to seek recovery. S. 1655 permits "interested parties" who are injured in their business or property to seek a private remedy. This differs from the 1916 Act (and from earlier versions of S. 1655), and from Section 4 of the Clayton Act, which authorize "any person" injured in its business or property to seek recovery. Although S. 1655 does not define the term "interested parties" as it is to be used in the amended antidumping law, we believe that it may be interpreted as having a broader meaning than the term, "party." The term is defined in the bill's other main section (concerning private enforcement of the customs fraud statute) to mean U.S. manufacturers, producers, or wholesalers of like or competing products, or trade and business associations representing such persons. It is also defined in the administrative statute itself (at 19 U.S.C. § 1677(8)) to include the foregoing, and certified or recognized unions or groups of workers representative of an industry producing or wholesaling like products as well. In light of these references, and the fact that the S. 1655 "injury" test includes injury to labor, a reasonable interpretation for

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4/ Injury to a domestic industry, for example, has been held to result from such arguably pro competitive effects as aggressive price competition and the demise of inefficient producers. See, e.g., Rhone Poulenc, S.A. v. United States, 592 F. Supp. 1318.

5/ The administrative antidumping statute, in contrast, is concerned only with injury or threat thereof to industry. An injury to labor could occur, for example, if low-priced imports required a U.S. industry to accelerate automation of its manufacturing processes, thereby displacing workers.

6/ Under the administrative statute, material injury could be based on material retardation of the establishment of a U.S. industry. 19 U.S.C. 1673. "Prevention of modernization" is an injury concept not found in the current dumping law.

"interested party" is that it may include labor unions and other worker groups as plaintiffs. Worker groups would presumably sue for damages based on lost jobs or reduced wages due to import competition. See n.5, supra.

Finally, S. 1655 would change the type of differential pricing that would give rise to civil liability. Instead of the 1916 Act's proscription of "common and systematic" U.S. sales at prices "substantially less than" foreign market prices, the bill would substitute the technical provisions of the administrative statute (discussed at pp. 1-2). A possible result of this change would be that sporadic (or even isolated) and unintentional differential pricing would support a civil claim, as would differential pricing that, although insubstantial, produced a dumping margin of more than 0.5 percent (see n.1 and accompanying text, supra).

The proposed legislation would, in addition, change the law to plaintiffs' benefit by giving evidentiary value to the results of related government dumping proceedings. In particular, final affirmative determinations of sales at less than fair value by the Commerce Department, or of injury or threat of injury by the U.S. International Trade Commission, would be prima facie evidence in a civil case of that particular element of the cause of action.

III. S. 1655 RAISES ANTITRUST POLICY CONCERNS BECAUSE IT FAILS TO INCLUDE A COMPETITIVE INJURY TEST

We believe that the legal standards provided by S. 1655 are inconsistent with current U.S. antitrust law and policy and could have an adverse effect on competition in the United States, particularly in industries where imports are or may become significant competitive factors. By reason of its definition of prohibited pricing practices and the uncertainty created by the wording of various provisions relating to both substantive and procedural aspects, S. 1655 would tend to forbid or inhibit the most important form of competition -- that relating to price.

First, an examination of the elements of a cause of action under S. 1655 indicates that the bill would attach civil liability to conduct which, if it occurred wholly with the United States, might not be illegal under our antitrust laws. Under the bill, a substantive offense is established by showing differential pricing between the U.S. and foreign markets and injury to a domestic industry from the imported product. As noted earlier in this Report, "injury" under the administrative antidumping law means economic losses suffered by the affected U.S. industry (e.g., loss of market share, declining prices, etc); it does not necessarily mean injury to competition.[7] Nothing in the bill in any way implicates a purpose or effect to restrain trade, or to substantially lessen competition or to tend to create a monopoly, one or more of which elements are generally found in the U.S. antitrust laws. See Sections 1 and 2 of the Sherman Act (15 U.S.C. § 1,2), Sections 2, 3, 7 of the Clayton Act (15 U.S.C. § 13, 14, 18). Anticompetitive purpose is also part of the 1916 Antidumping Act, which S. 1655 would amend.

S. 1655 should be compared with the domestic commerce analog of the antidumping law -- Section 2 of the Clayton Act, as amended, the so-called Robinson-Patman Act, 15 U.S.C. § 13. Like the 1916 Act in international commerce, the

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7/ In some cases, the same facts which support a finding of injury to competitors may also support a finding of injury to competition. Predatory pricing which significantly reduces the number of competitors would likely support both findings. Aggressive pricing of imports which was not predatory might be found to injure competitors, but might also be pro-competitive by reducing prices to consumers and eliminating inefficient producers.

Robinson-Patman Act prohibits discrimination in price by sellers in domestic sales but only, "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination...." Id. at § 13(a). Moreover, an affirmative, pro-competitive defense to a Robinson-Patman price discrimination charge may be based on the ground that the lower price "was made in good faith to meet an equally low price of a competitor...." 15 U.S.C. § 13(b).

Although their details differ, the Robinson-Patman Act and the 1916 Antidumping Act are similar in that both require a nexus between the proscribed pricing behavior and competition -- anticompetitive effect under Robinson-Patman and anticompetitive intent under the 1916 Act. S. 1655, on the other hand, would do away with any required anticompetitive purpose or effect. Under it, a set of transactions in international commerce (United States and foreign market sales at different prices) could be illegal where the same transactions, but in two different U.S. markets or to two different U.S. customers, would be legal. There would, moreover, be no analogous defense to a S. 1655 claim based on the exporter pricing his goods to "meet competition."

In addition to this inconsistent treatment of differential pricing depending on whether it occurred wholly or only partly in domestic commerce, S. 1655's private cause of action could have actual anticompetitive consequences, particularly in industries in which imports are or may be significant competitive factors. Because S. 1655 creates a civil cause of action for damages for injury to business or property founded only on a differential in pricing between the U.S. and some foreign country, and an effect of the imports on a U.S. industry, an unprecedented offense would exist for single firm conduct having no necessary connection to monopolistic, predatory or other anticompetitive purpose or effect, and which may in fact be pro-competitive.[8] The law could thus penalize price competition in the United States by foreign producers who were selling the same product at a higher price in their home market. Such differential pricing can occur for a variety of competitively "innocent" reasons. The home market, for example, may not be as competitive as the U.S. market, or its currency may be overvalued relative to the dollar, thus making its home market prices, when converted to dollars for price comparison purposes, seem higher than they should be.

The law could also penalize price competition in the United States by foreign producers who were not even selling a comparable product in their home market, but whose U.S. prices were below the hypothetical "constructed value" concept borrowed from the administrative statute. Such pricing might not be predatory or otherwise anticompetitive (and so no claim under Section 2 of the Sherman Act could be made), and yet it could support a claim under S. 1655 seeking damages for lost sales or profits. Without predatory intent as an element of the cause of action, successful aggressive pricing by imports could be inhibited because it could support a claim for damages by injured domestic competitors.

S. 1655 also has certain remedy provisions which may be unwise from a competition law perspective. The bill contains provisions, as are found in other federal

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8/ A most obvious example of a pro-competitive effect of less than fair value sales would be where the U.S. industry, prior to the introduction of imports into the domestic market, was highly concentrated and characterized by little price competition. Imports which undersold the domestic producers could cause "injury to a domestic industry" under S. 1655 by causing prices and sales revenues to decline, but could promote competition in the subject product market.

remedial statutes, for money damages and recovery of attorneys fees and other expenses. However, it also provides an unusual form of injunctive relief as a substantive remedy for violation of the law: "an injunction against further importation into, or sale or distribution within, the United States by such defendant of the articles in question...." S. 1655 also appears to reverse the rule that equitable remedies may be imposed only if legal ones are inadequate (see Dobbs, Remedies § 2.5 at 57 (1973)), by authorizing damages as a secondary remedy, "if injunctive relief cannot be timely provided or is otherwise inadequate." S. 1655, Sec. 801(c).

We believe that this injunctive provision is unsound. First, it authorizes an injunction against importation into, or sale or distribution within, the United States of the articles which are the subject of the litigation. Yet under the antidumping law, there is nothing intrinsically unlawful about the importation or sale of a particular product at less than fair value (unlike, for example, the sale of a product carrying a false trademark designation or which fails to meet applicable safety or health regulations). The alleged dumper can cure his conduct instantaneously by either raising its price to U.S. customers or by lowering its price to customers in its home market. Thus, an injunction against future importations or sale of the imported product in the U.S. is neither compensatory nor otherwise remedial, since it has no relationship to a violation of the law. All that such a remedy would accomplish is to bar access to the U.S. market to competing foreign products, which could have anticompetitive consequences.

We are not informed of any reason why money damages are an inadequate remedy for violations of the current or any amended antidumping law. Under the analogous Robinson-Patman Act, there is a well-developed body of case law concerning damages arising from differential pricing, which could be adapted to the antidumping statute.[9] See, e.g., Halleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29 (7th Cir. 1976). If, for some reasons, money damages were inadequate, then the appropriate injunction should be one prohibiting that which is prohibited by the law -- sales at less than fair value -- not imports per se.

We also believe that the role of labor interests under S. 1655 warrants closer examination. Under the 1921 and 1916 Acts, an element of an antidumping offense is injury to a competing domestic industry (1921 Act) or intent to injure a domestic industry (1916 Act). Under S. 1655, importations or sales which cause or threaten material injury to "industry or labor in the United States" (emphasis added) would constitute an element of the cause of action. Under the bill, worker groups would presumably be able to sue for damages based on lost jobs or reduced wages due to competition from imports. The antitrust laws, on the other hand, are not thought to permit a cause of action by employees against a person who may have committed an antitrust offense against the employer (e.g., Solinger v. A&M Records, Inc., 586 F.2d 1304, 1311 (9th Cir. 1978).

9/ S. 1655 also contains, in Sec. 801(H), a provision authorizing an injunction against further imports or sales of the products in litigation by any defendant which fails to comply with a discovery or other interlocutory order of the court. We believe that this provision is simply overkill. The Federal Rules of Civil Procedure (in particular, Rule 37(b)(2)) provide ample means for enforcing discovery obligations, including contempt proceedings and the entry of a default judgment. These sanctions have been used against foreign parties (see, e.g., Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982)), and there is no reason to conclude that a civil antidumping case cannot be effectively litigated with the same rules of procedure as other federal court litigation against foreign persons.

IV. S. 1655, AS PRESENTLY DRAFTED, PRESENTS SEVERAL PROCEDURAL CONCERNS

Apart from the antitrust issues raised by S. 1655, we believe the bill contains other substantive and procedural concerns that should be addressed. First, because of the adoption by S. 1655 of the standards of the administrative antidumping statute (which require the exercise of considerable discretion and judgment in their application), an exporter who sought to comply with U.S. antidumping laws could not be confident that his prices were not at less than fair value. For example, an exporter could not know in advance whether "foreign market value" would be calculated by weight-averaging his home market sales prices, by only using prices for sales close in time to each U.S. sale under investigation, or by one of several other techniques which have been utilized in the past by the Commerce Department. The very uncertainty as to whether prices met the "standard" of S. 1655 would tend, of itself, to inhibit if not prevent price competition, the most important mode of competition, and would thus compound difficulties under the bill.

Under the government statute, actual antidumping duties are only assessed after a dumping determination, i.e., after a less than fair value pricing methodology for the case has been decided by the Commerce Department. Armed with that information, the affected exporter can make necessary pricing adjustments and know, with a high degree of confidence, whether or not his prices thereafter will subject his exports to antidumping duties. If, on the other hand, the statute were administered judicially, an exporter would be at his peril in pricing goods for sale in the United States, because the same process which established the less than fair value methodology would also invoke potential civil liability for importations during the four-year statute of limitations period.

A second concern arises from Section 801(D) of S. 1655, which would give prima facie effect in private civil actions to less than fair value determinations by the Commerce Department and to injury determinations by the ITC in administrative dumping proceedings involving a product in issue in the civil action. A Commerce Department finding of less than fair value sales means nothing more than, during its six-month investigation period, there was a weighted average dumping margin of a particular amount. It is not clear under S. 1655 what effect such a dumping finding would have in the civil action. If it is that the defendant sold at less than fair value during the full four-year period of the civil claim (or some other period that is greater than or otherwise different from the Commerce six-month investigation period), then such an effect is clearly unwarranted, since the Commerce finding is limited to its six-month investigation period.

The provisions of S. 1655 also suggest that a Commerce Department dumping finding may be asserted against any exporter of the product subject to the dumping finding.[10] Under Commerce Department regulations, the agency will usually investigate exporters accounting for at least 60 percent of the dollar volume of exports to the United States. 19 C.F.R. 353.38. Under an increasing caseload in recent years, Commerce has tended to investigate only major exporters and often excludes from its pricing investigation exporters responsible for, in the aggregate, 20 to 40 percent of exports. See, e.g., Hydrogenated Castor Oil From Brazil, Inv. A-351-410, 50 Fed. Reg. 51725, 51726 (Dec. 18, 1985). In such situations, the Commerce dumping determination will include individual dumping margins for the companies actually

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10/ As noted earlier in this Report, government dumping investigations are directed against a particular product from a particular country, rather than against a particular company.

investigated, and a weight- averaged dumping margin for "other," uninvestigated exporters.[11]

It is entirely possible that these uninvestigated exporters did not sell at LTFV at all and yet, because of the method in which the government investigation operates, they could be subject to the prima facie evidence provision of S. 1655. (This potential unfairness under the administrative statute is mitigated when actual antidumping duties are assessed, since the assessment can be company-specific and based on actual sales prices of investigated and uninvestigated exporters.)

The use of ITC injury determinations as prima facie evidence also raises serious questions. The ITC appears to be moving in the direction of making injury determinations based on whether the imports under investigation are injuring a domestic industry, rather than whether the amount of dumping is causing such injury. See note 2 supra. For example, if Commerce determined that the aggregate margin of dumping were 2 percent, and the ITC determined that the investigated imports were injuring a domestic industry by underselling its products, the ITC could make an affirmative injury finding. It would not need to consider whether underselling would have occurred even if imports were priced 2 percent higher, i.e., even if they were not sold at less than fair value. This difference in causation analysis is significant in a civil context, since the ITC's approach (if adopted by the courts) could allow recovery for underselling even if the margin of underselling were unrelated to sales losses or to other economic injury suffered by a domestic competitor.

An ITC determination also has temporal limitations. It typically studies "injury" spanning a two to three year period, usually assuming that the ITA 6-month dumping margin applied throughout the ITC's investigation period. Thus, the ITC could premise an injury determination on events occurring before and even after the ITA's six month investigation period, when there might not have been dumping in fact. Once again, this lack of rigor may be excusable under the present administrative statute because it operates prospectively only, allowing an exporter an opportunity to modify its pricing practices and thereby avoid the actual imposition of dumping duties. In an antitrust context, it hardly seems an appropriate basis on which to premise an award of compensatory damages or an injunction against imports.

Finally, and as a general matter, the use of Commerce and ITC determinations for even the narrowest of purposes raises due process concerns. The determinations of these agencies are not made under the procedural protections of the Administrative Procedure Act. 19 U.S.C. § 1675(a). In addition, the agencies may rely on information from sources other than the parties, with little or no regard to its authenticity or reliability, there is no effective cross-examination of witnesses, and ex parte communications with Commerce investigating personnel and ITC staff and Commissioners are not prohibited.

This situation should be contrasted to that under Section 5a of the Clayton Act, which permits a "final judgment or decree ... rendered in any civil or criminal [antitrust] proceeding brought by or on behalf of the United States to the effect that a defendant has violated [the antitrust] laws" to be used as prima facie evidence in a

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11/ For example, if Exporter A, with a dumping margin of 10 percent and accounting for 40 percent of exports to the U.S., and Exporter B, with a 6 percent margin and accounting for 20 percent of exports, were the only two firms investigated, exporters accounting for the remaining 40 percent of exports would be in the "other" category, with an assigned margin of 8.67 percent ((.4 x 10% + .2 x 6%)/(.4 x .2)).

private civil action, but only as to "matters respecting which such judgment or decree would be an estoppel as between the parties." 15 U.S.C. 16(a). S. 1655 contains no such limitation or other protection against the use of administrative agency findings reached without adequate procedural safeguards.[1]

V. CONCLUSION

Although the Antitrust Section of the American Bar Association takes no position on the trade policy issues involved in S. 1655, we are impelled to criticize, from the standpoint of antitrust law, both the substantive and procedural provisions of the bill. For the reasons set forth above, we believe that passage of the bill in its present form could seriously impair competition, particularly in those industries which benefit most from import competition.

The provisions of the bill could significantly inhibit price competition in such industries and others which benefit from the purchase of low-priced raw materials and components. Without the direction provided by a competition test, the bill's provisions could be utilized to achieve anticompetitive results by those seeking to block further competition. Possible damage to the competitive standard would be further accentuated by those provisions which weaken the substantive tests presently required to recover civil damages for dumping -- e.g., those defining differential pricing, injury and injured parties. Finally, certain of the procedural provisions of the bill could drastically shift the burden of proof to defendants (e.g., the provision for giving prima facie effect to related administrative findings) and could endanger future as well as present competition (e.g., the proposed injunctions against future imports).

We submit that, regardless of its other possible merits, S. 1655 in its present form could exact a heavy price by its neglect of the competitive standard. We urge that the bill be rejected.

Submitted on behalf of the
Antitrust Section by
Barry E. Cohen, Chairman,
International Trade Subcommittee

1/ One section of H.R. 4800, the House of Representatives' omnibus trade bill, approaches a civil remedy for dumping differently. It would add a new section to the administrative antidumping statute, authorizing a civil claim for damages arising from dumping, but only in situations where an administrative dumping investigation concerning the same product resulted in any antidumping order.

The House provision does not raise all of the procedural concerns discussed in this Section of our Report, but antitrust concerns remain. Under the House bill, a civil antidumping claim could be based upon (1) less than fair value sales and (2) consequential injury to a United States competitor. Like S. 1655, the House bill requires no proof of injury to competition. Unlike it, however, it requires no proof of injury to a domestic industry, presumably because the cause of action is authorized only after an ITC finding of such injury in an administrative dumping investigation.

As we noted in our discussion of the ITC's injury determination (p. 9), that determination has very limited significance in a civil context: it has temporal limitations, it may not even be based on the importations of a party that is a civil defendant, and it is reached under procedures that do not provide due process protections. Thus, for those causes of action it authorizes, the House bill may allow damages to be recovered for nothing more than differential pricing, whether pro-competitive or anti-competitive, and whether or not the defendant's imports were injurious to a domestic industry. As with S. 1655, we believe that such a remedy could have adverse effects on legitimate price competition from imports.

TESTIMONY BY

JOHN LISON
VICE PRESIDENT AND GENERAL COUNSEL
ATCOR, INC.

AND

ROGER B. SCHAGRIN
SCHAGRIN ASSOCIATES
COUNSEL

BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL TRADE
OF THE
COMMITTEE ON FINANCE
OF THE
UNITED STATES SENATE

IN SUPPORT OF
S. 1655

AUGUST 1, 1986

ATCOR is the largest non-integrated producer of welded steel pipes in the United States and is one of the founding members of the Committee on Pipe and Tube Imports (CPTI). The CPTI is a domestic trade organization composed of companies representing 75% of the U.S. production of welded steel pipes and tubes. The CPTI has aggressively used the unfair trade laws, filing or participating in approximately 50 antidumping and countervailing duty suits in the last 4 years. In cases filed by the CPTI, we successfully proved the existence of dumping or subsidization in 90% of our cases and proved injury in 75% of all cases. A list of the cases in which the CPTI has participated is attached. Despite our successes, the U.S. pipe and tube industry continues to be injured by unfairly traded imports. ATCOR and its fellow members of the CPTI support the concept of a private right of action for damages for dumping as an important new tool to complement and strengthen the existing antidumping laws.

ATCOR has found that there are a number of problems which limit the effectiveness of the antidumping laws in shielding a domestic industry from unfair trade practices. One major limitation is that the antidumping laws provide only prospective relief for a domestic industry. All antidumping duties collected go to the United States Government. The petitioning industry, which has been found to be suffering material injury and which may have incurred substantial expenses to pursue the case, receives no compensation for the injury suffered or the expenses incurred.

For example, ATCOR is an important producer of welded steel standard pipes. Through the CPTI, ATCOR has been involved in 12 antidumping cases concerning these products since 1983. The International Trade Commission (ITC) has ruled in each of these cases that the domestic standard pipe industry is suffering material injury by reason of less-than-fair-value (LTFV) imports of standard pipe. Under the existing law, ATCOR must consider the injury caused by LTFV imports during that period as an absolute loss. Domestic industries can receive no compensation for the business they lost, for the increased losses or decreased profits due to price suppression or depression by LTFV imports. These losses can be devastating to the future performance of an industry since they directly effect an industry's ability to invest in new plant and equipment or research and development needed to obtain or maintain a competitive advantage.

By providing domestic industries with a private remedy for dumping, Congress would allow those industries to recover the actual damages caused by dumping from the parties directly

responsible for the harm. Whether one considers dumping a commercial tort or an antitrust matter, it is only proper that the injured party be given the opportunity to recover damages for the actual harm done. More importantly, however, the threat of liability for actual damages insures that dumping is no longer a risk-free proposition for importers and foreign producers.

From ATCOR's experience in the steel pipe and tube industry, importers and foreign producers share equal roles in exploiting the weaknesses of the dumping laws to the injury of the domestic industry. Often, foreign pipe producers, when faced with an imminent dumping order, race to ship as much dumped pipe as possible before the dumping duty becomes effective. Once the dumping duty is applicable, they merely shift production into related or "downstream" products and begin dumping that new product.

Importers, being rational, profit-maximizing businessmen, buy as much dumped pipe as possible from their source. Once that source dries up, they actively seek out other sources of dumped products. This has been particularly true in the pipe market. After the initiation of the VRA program on pipe and tube products in late 1984, importers who had bought dumped pipe from traditional sources in the European Community, Korea, Brazil, Spain and others began to seek new suppliers of dumped pipe. Producers in Venezuela, India, Turkey and Thailand, who had shipped almost no pipe to the United States prior to the VRA program, began shipping massive amounts of dumped pipe to the United States. In a recently concluded dumping investigation, counsel to a Turkish pipe producer admitted to the ITC that it was the importers who had sought out his client's dumped products (see transcript attached). As our antidumping cases began to threaten these sources of supply, importers sought new sources of dumped pipe in Singapore, the Philippines and the Peoples Republic of China. ATCOR has found that for each hole we close with an antidumping action, a new hole is created as importers shop for new suppliers. For each new source of dumped pipe, ATCOR and its fellow producers are forced into the costly position of filing another dumping case.

A private damages remedy will remove the incentive for foreign producers to dump and for importers to seek dumped goods. Financial responsibility for the actual injury caused will create a real risk to importers and foreign producers that is likely to act as a much more effective deterrent to dumping than our present law alone. ATCOR and the other members of the CPTI believe that a private damages remedy which can be effectively used by U.S. producers will result in less need for domestic industries to resort to the existing antidumping laws.

ATCOR and the CPTI are pleased that the Senate is considering this amendment to the 1916 Act to complement and strengthen our current antidumping laws. We support the concept behind S. 1655 and find much merit in the bill. However, the members of the CPTI believe that this Committee should consider some refinements along the lines of the provisions offered in H.R. 4800 or those presented in the version being sponsored by the Trade Reform Action Coalition, of which the CPTI is a member.

ACTOR and the CPTI respectfully suggest that the following changes in S. 1655 would create a more workable private remedy:

1. Require domestic parties to first obtain an antidumping order from Commerce. This encourages parties to use the existing trade laws which are internationally accepted to deal with the prospective problem of dumping and discourages frivolous law suits. Any amendment to the 1916 Act should complement and strengthen, rather than compete with, our existing antidumping laws.

2. U.S. importers who knew or should have known that the imported products were dumped should be held liable. Congress should seek to pass a balanced law which does not unduly chill fair trade. The aim is to stop the knowing importation of dumped products, not punish an importer who unknowingly accepts what is in all other respects a good business deal.

3. Injunctive relief as a private remedy is unnecessary. U.S. and international law presumes that antidumping duties imposed under an antidumping order accounts for the unfair element in the price of the good. No other prospective relief is necessary. Furthermore, since a court will only grant an injunction when no other remedy is possible, no federal court would be likely to issue injunctive relief to a company which had not already pursued its administrative remedy.

Dumping is considered an unfair trade practice both under our national law and under international law. A private right of action to recover actual damages caused by dumping is a natural complement to our existing antidumping statutes, providing redress for past injury and deterring future injurious actions. ATCOR and the CPTI believe that the Congress can pass a private remedy bill which can be successfully used by domestic industries, but which is not protectionist and which does not place an inappropriate chilling effect on U.S. importers.

SUMMARY OF TRADE CASES FILED AND/OR PARTICIPATED IN BY THE CPTI

	Case	Country	Products	Date Filed	Commerce/ITC Results
1.	CVD	S. Africa	All Pipe & Tube	9/82	26% subsidy margin, suspension agreement, petition withdrawn
2.	AD	Taiwan	Standard	3/83	9.7%-42.7% final margins
3.	CVD	Korea	Standard	3/83	0%-1.88% final margins; partially withdrawn pursuant to VRA
4.	AD	Korea	Standard/ Mechanical	3/83	0%-1.5% final margins; partially withdrawn pursuant to VRA; appeal before CIT
5.	AD	Brazil	Line	4/84	23% final det., withdrawn pursuant to VRA
6.	CVD	Spain	Standard and Mechanical	6/84	Prel. - 1.14%; withdrawn pursuant to VRA
7.	AD	Spain	Standard and Mechanical	6/84	Prel. stnd. - 19.13%-53.01%; Prel. mech. - 49.69%; withdrawn pursuant to VRA
8.	AD	Brazil	Standard	6/84	Final det. - 23.55%, withdrawn pursuant to VRA
9.	CVD	Brazil	OCTG	6/84	11.35%-25.24% final det.; withdrawn pursuant to VRA
10.	CVD	Korea	OCTG	6/84	.53% final det.; withdrawn pursuant to VRA
11.	AD	Korea	OCTG	6/84	Negative det.

	Case	Country	Products	Date Filed	Commerce/ITC Results
12.	CVD	Spain	OCTG	6/84	11.29%-24.74%; withdrawn pursuant to VRA
13.	AD	Spain	OCTG	6/84	76.8%; withdrawn pursuant to VRA
14.	AD	Argentina	OCTG	6/84	61.7% final det.; withdrawn pursuant to VRA
15.	CVD	Argentina	OCTG	6/84	.9% final det.
16.	AD	Mexico	OCTG	6/84	withdrawn pursuant to VRA
17.	CVD	Mexico	OCTG	6/84	withdrawn pursuant to VRA
18.	CVD	Mexico	Line, Standard, and Mechanical	10/84	23.65% prel. margin; withdrawn pursuant to VRA
19.	AD	Taiwan	Mechanical	1/85	Final det. - 7.05%; negative final injury det. in Dec. 1985
20.	AD	Venezuela	Line, Standard	1/85	Prel. Stnd. - 26.19% Prel. Line - 55.7%; Withdrawn pursuant to VRA
21.	CVD	Venezuela	Line, Standard	3/85	Prel. - 76% Withdrawn pursuant to VRA
22.	AD	Canada	Structural	3/85	Final det. - .65%; negative final injury det. in Dec. 1985
23.	AD	Thailand	Standard	3/85	Final det. - 15.69%
24.	CVD	Thailand	Standard	3/85	Final det. - 1.8%
25.	CVD	Austria, Romania, Venezuela	OCTG	3/85	Romania - withdrawn Venezuela - withdrawn Prel. Austria - 1.82%; withdrawn pursuant to VRA

	Case	Country	Products	Date Filed	Commerce/ITC Results
26.	AD	Austria, Romania, Venezuela	OCTG	3/85	Romania - withdrawn Venezuela - withdrawn prel. Austria - 2.93% withdrawn pursuant to VRA
27.	AD	Canada	OCTG	7/85	Final - 3.35%-40.85%
28.	CVD	Turkey	Standard/ Line	7/85	18.81% Final Det.
29.	CVD	India	Standard	7/85	Final Negative Det.
30.	CVD	Taiwan	Line	7/85	Final Negative Det.
31.	AD	Yugoslavia	Standard	7/85	Final - 33.26%
32.	AD	Turkey	Standard/ Line	7/85	Final -- 14.74% - standard 14.81% - line
33.	AD	India	Standard	7/85	Final - 7.08% -
34.	AD	Taiwan	Line	7/85	Final - 27.98%
35.	AD	Taiwan	OCTG	7/85	Prel. det. 5.6%
36.	AD	China	Standard	11/85	Prel. det. 17.97%
37.	AD	Philippines	Standard	11/85	Prel. det. 10.2%
38.	AD	Singapore	Standard/ Rectangular	11/85	Prel. det. -- 25.47% - standard 26.08% - rect.

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE U.S. INTERNATIONAL TRADE COMMISSION

Meeting of the Commission

Date: Tuesday, January 7, 1986

Time: 10:00 a.m. - 2:37 p.m.

Pages: 1 thru 169

In the Matter of:	*	
CERTAIN WELDED CARBON STEEL PIPES AND TUBES FROM TURKEY	*	Investigation No. 701-TA-263 (Final)
In the Matter of:	*	
CERTAIN WELDED CARBON STEEL PIPES AND TUBES FROM THAILAND	*	Investigation No. 731-TA-252 (Final)

Washington, D.C.

ALDERSON REPORTING

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WASHINGTON, D.C. 20001

COMMISSIONER ROHR: When Borusan started exporting to the United States, were you approached, was Borusan approached by a U.S. company to sell the product? Or did Borusan go out and seek the U.S. business on its own?

MR. BARRINGER: My understanding -- and again, this is all hearsay -- my understanding is that they were approached by an importer from the United States.

COMMISSIONER ROHR: By an importer?

MR. BARRINGER: Yes.

COMMISSIONER ROHR: I would appreciate it if you could confirm that understanding.

MR. BARRINGER: Certainly.

COMMISSIONER ROHR: How long have you represented Borusan?

MR. BARRINGER: Since the case was initiated. I am not, as was apparently was -- the possibility of my being the hub of a conspiracy of pipe producers, is not in fact true. I have never represented any of these people, and this was raised in the Singapore hearing before they had a case filed against them.

COMMISSIONER ROHR: Mr. Barringer, I am not implying that you are the hub of anything. I am just simply asking questions, if that is all right with you.

CHAIRWOMAN STERN: He's just a big wheel.

MR. SCHAGRIN: Okay. I thought it was referring to 131 tons. Okay. So I guess you would think that all of their line pipe sales to date have just been spot sales.

MR. BARBINGER: Yes. I was trying to get across the point there very simply that this is -- Borusan has not sat down and said we are going to ship huge quantities to the United States on a sustained basis.

MR. SCHAGRIN: How about their importer which was asking them for imports? Did the importer who contacted them say we would like to import from you large tonnages on a sustained basis?

Did the chairman give you any idea of that information?

MR. BARBINGER: I have no idea. My guess is that as you said earlier, that there are many importers, they are very anxious to find foreign sources for steel. There is no question about that.

MR. SCHAGRIN: In one of your answers to Commissioner Bohr you did say as to Turkey that it was the importer that had contacted Borusan. I was very interested by that question, and while he asked you to respond as to Thailand in your posthearing brief, I am afraid my interest is so great that I would like to ask

TESTIMONY OF

HON. FRANK J. GUARINI

ON

A PRIVATE RIGHT OF ACTION FOR DUMPING

SENATE COMMITTEE ON FINANCE

SUBCOMMITTEE ON INTERNATIONAL TRADE

JULY 18, 1986

WASHINGTON, D.C.

Mr. Chairman, I deeply regret not being able to testify before you personally to speak about the great need to include a private damages remedy in the omnibus trade bill which your committee will be crafting. My duties as a member of the Select Committee on Narcotics Abuse and Control called me to New York City for a hearing on the growing use of an extremely dangerous substance called "crack." Nevertheless, I am grateful for the opportunity to submit this testimony for your consideration.

Over the past five years, the United States has shifted from a position of economic dominance to one of declining competitiveness. The shortsighted policies of the Reagan Administration have caused our trade deficit to reach a record $150 billion in 1985 and estimates for 1986 run as high as $175 billion. The Department of Commerce estimates that for every $1 billion of our trade deficit we lose some 25,000 jobs. A weaker dollar alone will not shrink this growing menace.

Our current trade laws do not provide prompt relief to ailing industries nor do they act as a deterrent to unfair foreign trade practices. International trading patterns and practices have become highly sophisticated. U.S. industries face competition from foreign manufacturers who dump their goods into our market and from foreign countries which give their industries preferential treatment in order to make them more competitive.

We can no longer sit by and watch these unfair foreign practices threaten our industries, our economy and our national security. There is a growing consensus that the time is now to reform and modernize our trade laws. This was clearly affirmed by the House of Representatives on May 22 in the overwhelming passage of H.R. 4800, the Trade and International Economic Policy Reform Act.

H.R. 4800 is a comprehensive trade reform bill. It was crafted with the expertise of six committees which have jurisdiction over trade. It is a realistic approach to dealing with unfair trade practices and enforcing the principles of fair trade.

As a member of the Ways and Means Subcommittee on Trade, I had a large hand in crafting titles I, II and VIII of the omnibus trade bill. In these provisions we included measures to help resolve disputes faster and provide more prompt relief to U.S. industries under section 201 and make foreign industrial targeting an unfair trade practice under section 301. With regard to our antidumping laws, we included an essential modernizing provision - a private right of action for U.S. companies injured by the dumping of goods into the U.S. marketplace.

The need to deter dumping is widely recognized. Illegal

dumping has and continues to cost hundreds of thousands of U.S. jobs and critically injure American industries.

Our antidumping laws are exercised more often than any other of our unfair trade laws. Since 1974, the ITC has initiated more than three hundred dumping investigations and at present there are more than 80 outstanding dumping orders. Our antidumping statutes, however, do not discourage dumping. Foreign manufacturers continue to dump into our markets because the only penalty is a duty assessed prospectively on foreign imports. They know they won't be punished for past behavior and can wait until an administrative order is published before they change their practices. Moreover, a dumping duty is a small price to pay to target U.S. industries and gain larger market share. Further, this duty is remitted to the United States Treasury. Companies harmed by dumped imports are not compensated for their loss.

To stop dumping, we need strong a deterrent such as a private right of action which will make foreign manufacturers fear the consequences of their unfair trade practices.

A private right of action is not new. One has been on the books since 1916, but it has never been exercised because it has criminal penalties and the burden of proof - intent to injure or monopolize a U.S. industry - is too high.

As you know, there is significant support for the creation of a a private right of action. In the full Ways and Means Committee, I added the provision to H.R. 4800 permitting parties injured by dumped imports to recover damages for such harm. In crafting this provision, I consulted extensively with the House Judiciary Committee which gave their full backing to the measure. Senators Specter, Baucus and Cranston have also introduced private remedy bills which have broad bipartisan support. These bills, however, differ from my provision in a number of important ways. While I would like to commend their efforts in this area, I would also like to highlight these differences.

Under the private remedy provisions in H.R. 4800, actions would be brought in the Court of International Trade rather than in the D.C. District Court as provided for in S. 1655. The federal district court of the District of Columbia already suffers from an overcrowded docket. The addition of this class of complicatd litigation can only add to that problem. The Court of International Trade, with its less crowded docket, already has jurisdiction over virtually all customs matters, including review of administrative decisions under the antidumping laws. Thus, the CIT already has expertise in this area. The D.C. District Court is unfamiliar with the unique administrative proceedings provided for in our unfair trade statutes. Furthermore, appeals from these two courts would be

heard by separate appeals courts. This is not conducive to developing a consistent body of judicial precedent. Rather, it will encourage the undesirable result of forum shopping by plaintiffs. The consistent, equitable administration and interpretation of our unfair trade laws and the interests of plaintiffs and respondents in such cases will best be served by consolidating judicial review in one court.

Unlike S. 1655, the provision in H.R. 4800 requires a domestic company to first obtain an antidumping order from the Department of Commerce to provide evidence that U.S. dumping laws have been violated. To allow a private court action before an antidumping order is issued is to encourage frivolous lawsuits and unnecessarily burden the courts with unmeritorious cases. S. 1655, which has no administrative requirement, would encourage a plethora of lawsuits and create an alternative that would discourage the use of existing administrative remedies. This is also the case with S. 2408 which requires a party to chose between private action and the imposition of antidumping duties. A private damages remedy should not compete with our present system, but should complement and strengthen our existing antidumping statutes.

My provision also provides that foreign producers, exporters and importers can be defendants in an action. Foreign producers are presumed to know that they are dumping, but plaintiffs must show

that other defendants know or should have known that the imported products were sold at less than fair value. Both S. 1655 and S. 2408 do not allow the importer who profits from the knowing importation of dumped products to be held accountable.

The House provision is balanced in its approach. It does not threaten the importation of fairly traded goods, but by allowing for action against an importer who knowingly imports dumped goods, it deters importers from seeking out several sources of unfairly traded goods to avoid dumping duties. It does not punish an importer who has no reason to suspect that the goods he purchased may be dumped. Additionally, allowing action against an importer makes service of process and the execution of a judgment possible. The other bills may result in American companies incurring tremendous expenses for a judgement which is difficult to pursue.

Lastly, my provision would not allow domestic plaintiffs to obtain an injunction against further importation of the articles in question. It is a principal of our common law that a court will not grant injunctive relief unless no other remedy is available to the party requesting relief. U.S. law and international law presume that once an antidumping order has been made, no further prospective relief is necessary since the unfairness has been made fair by the imposition of antidumping duties. The private right provision in H.R. 4800 addresses only the collection of actual damages suffered

which are not cured by the antidumping order. By allowing for single damages and prohibiting injunctive action, my provision serves as a strong deterrent not a punitive measure. Further, injunctive action, besides being impractical invites charges of GATT violations and inhibits rather than encourages free trade.

I am pleased that your committee is continuing the vital task of crafting legislation to reform and modernize our trade laws. No comprehensive trade law reform would be complete, however, without the inclusion of a private right of action to deter the practice of dumping foreign goods into our market and to provide compensation to injured U.S. industries. On these grounds, I urge you to include the private right provision found in H.R. 4800 in drafting your committee's bill. Thank you.

Before the Senate Finance Committee

July 18, 1986

Written Statement of Noel Hemmendinger in Opposition to S. 1655 and Related Proposals for a Private Cause of Action for Damages for Dumping

My name is Noel Hemmendinger. I have been a practitioner of trade law in Washington for 30 years. I am Counsel to the law firm of Willkie Farr & Gallagher, located in its Washington office. The law firm is registered under the Foreign Agent's Registration Act on behalf of a number of foreign clients. I submit this statement on my own behalf and neither the law firm nor clients of the law firm are responsible for the views expressed.

Trade bills pending in the Congress include a number of proposals that would grant persons injured by dumping of foreign goods the right to sue exporters and/or importers for damages (Section 138 of HR 4800, S.1655, S 2408). The remedy for dumping under present law is a special dumping duty collected by U.S. Customs.

I believe that the creation of a private cause of action for damages for dumping would be a serious mistake.

1. A private cause of action for dumping is fundamentally inconsistent with the economic and legal theory of dumping, that involves protection under special circumstances against rational and legal business competition.

It is normal business conduct to price a product differently for different markets, and to do so is perfectly rational so long as the price in each market exceeds the variable cost. This is done all the time within the United States. Internationally dumping has long since been defined in economic literature and law as selling at a lower price in a foreign market than in the producer's major market, normally the home market, to the injury of foreign producers. Such differential pricing is frequently beneficial to the importing country and is the subject of countermeasures only if the producers in the importing country suffer material injury. It is misleading to call such pricing illegal, with the connotation that it involves tortious behavior. The only recognized countermeasure is a special customs' duty to protect the U.S. producer, a duty that is not a penalty and not based on wrongful conduct.

2. It would violate the international obligations of the United States under Article VI of the GATT and the Antidumping Code, and also under the commercial treaties guaranteeing national treatment to the goods of other signatories.

Article VI of the GATT adopted in 1948 and the Antidumping Code adopted in 1979 set forth the ground rules that are internationally accepted by the United States and most other trading countries for countermeasures against dumping. The sole remedy provided is a dumping duty which is equal to the margin of dumping, that is, the margin by which the export price, with appropriate adjustments, is lower than the "normal value" which is usually the home market price. Article VI provides:

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in the amount than the margin of dumping in respect of such product.

Moreover, Article 8 of the Code provides that the duty is to be no greater than is necessary to remove the injury.

Such a provision would further violate international obligations of the United States because treaties of Friendship Commerce and Navigation (FCN treaties) with many countries guarantee national treatment for the goods of those nations. Differential pricing within the United States is not presently actionable except under circumstances that are narrowly defined under the antitrust laws. A provision such has been proposed against imports would subject imports to risks and penalties to which domestic products are not exposed under similar circumstances and would thus be a denial of national treatment.

3. It would invite retaliation by other countries and the adoption of mirror legislation adverse to U.S. exports.

This is because such a provision would seriously hurt the interests of many countries selling to the United States. Retaliation might well take the place of mirror legislations subjecting U.S. goods to similar risks. Products of the United States have frequently been the subjects of antidumping proceedings in the European Communities, Canada, Australia and other countries. Every significant trading country would be tempted to adopt similar legislation. The harm to the U.S. export trade would exceed any benefit to the U.S. firms and industries that were able to recover monetary damages.

4. Existing laws already provide a cause of action against predatory pricing.

The idea of civil remedy for injury from dumping is appealing to many people who assume that dumping is predatory, that is, designed to drive the competitors out of business and then to take advantage of a dominant position in the market. Such conduct is already actionable under a number of United States laws: Section 2 of the Sherman Act, the Robinson-Patman Act, the Federal Trade Commission Act, the Wilson Act, and the

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Antidumping Act of 1916. It is the subject of an extensive literature, most notably the writings of Turner and Areeda of the Harvard Law School. The theory was discussed at length by the Supreme Court in March of 1986 in the Zenith case. (Matsushita Electric Industrial Co. v. Zenith Radio Corporation, 89 L.Ed.2d.538, 54 USLW 4319). American television producers sought to recover damages from Japanese competitors who were found to have sold TV's in the United States at dumping prices but the Court held that predatory intent could not be inferred. Success in such proceedings is extremely rare domestically as well as against imports because such conduct is extremely rare. To quote the Supreme Court: "...there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." 89 L.Ed.2d at 554, 54 USLW at 4323. Predatory pricing is even less likely to be found in the import trade of the United States, because the import trade of the United States is for the most part highly competitive even where only one source country is involved.

5. The added risks of importation, not only from the possibility of judgment for damages but merely from the likelihood of litigation, would have a chilling effect on imports and be damaging to the U.S. economy.

The creation of such risks would discourage some importations altogether and require importers to take out insurance, in effect, by charging higher prices to cover additional costs and risk of additional costs. Dumping findings under the U.S. law do not result from a determination that the U.S. economy is hurt by the imports. On the contrary, the U.S. economy may on balance be benefitted. In testifying on similar legislation in 1983, Assistant Attorney General William F. Baxter said:

> To the extent that enactment of these bills results in the restricted availability of imported goods or in higher prices for such products, other U.S. industries could be affected adversely. We must remember that not all imported products are consumer goods. Many imports are used by U.S. firms as inputs in their manufacturing operations. Often, these business rely on low-priced imports to remain competitive with other U.S. firms as well as their foreign competitors . Thus, [these laws] actually could have the effect of hurting the very U.S. businesses and workers that they are intended to protect.

6. Dumping under the United States law is a very technical conception that depends heavily on capricious exchange rates. Both exporters and importers frequently are unaware whether they are dumping or not until a determination has been made after the event.

Despite the conventional wisdom favoring "fair trade" and condemning "unfair trade", the distinction is meaningless under floating exchange rates that have become disconnected from comparative advantage in trade. Shifts in exchange rates make dumpers one day and unmake them the next. Far from being a reasonable test for tortious conduct, "dumping" under present circumstances is not a reasonable test for conduct that is unfair in any sense. Sellers and buyers who schedule sales ahead of time cannot anticipate the exchange rates that will prevail when the transaction is closed. Both sellers and buyers put great value on continuity of relationships and cannot conduct business on the basis of spot orders and frequent cancellations.

For this reason and others that follow from the manifold technicalities involved, exporters and importers frequently do not know whether there is dumping until a detailed investigation has been conducted. Business planning must be based on assumptions as to the relevant exchange rates as well as rules that will be applied by the United States Government. No one can foresee the exact results of a Commerce determination, and the range of possibilities is large. Importers unrelated to the exporters are particularly unable to eliminate the likelihood of dumping, because they do not know the producer's market prices, selling costs or costs of production.

There are three circumstances in which dumping may be found.

The first and most usual is selling below the price in the home market. The importers would not usually know this price, and neither producers nor importers would know just what adjustments would be allowed in comparing export and home market price. A foreign producer who by his own analysis is making exactly the same profit in the home market as in the United States market can be found by the U.S. authorities to be selling at a significant dumping margin.

The second is where the sales in the home market are not significant, and export prices are found to be below the price in a third market. Similar considerations apply.

The third is that if prices in the home market or the third market are found not to cover full costs, then the standard to be applied is a statutory standard which includes an arbitrary element of ten percent for administration costs and eight percent for profit. The eight percent profit may well be far in excess of that which is common in the industry in question.

7. Such provisions would lead to expensive litigation on top of the already excessive litigation which is involved in the enforcement of the U.S. Antidumping Act.

If the U.S. law that provided for a private right of action set forth its own standards of tortious dumping different from those applied under Title VII of the Trade Act of 1979, then the legislation would inevitably lead to complex and expensive litigation. While this would be harassing to importers and to foreign exporters it would not readily serve the interest of the aggrieved U.S. parties. If, as is proposed in Section 138 of HR 4800, the law were to embody the simple standard of whether there had been a dumping determination under Title VII, then the law would be entirely inappropriate, because, as discussed above, Article VII embodies a conception of protection against injurious imports that is quite different from the standards for wrongful behavior under American law.

8. If such provisions were adopted, defenses would have to be considered, such as meeting competition, that would deprive the provision of the direct relation to findings under the Antidumping Act.

If dumping is to be regarded as tortious behavior, then new elements must be introduced in fairness to all concerned, for instance, the defense that the price was necessary to meet competition, a defense which is allowed under the Robinson-Patman Act.. Moreover, considerations of basic fairness would require a higher standard of proof for a judgment for damages. In the proceedings before the Department of Commerce, the determination is made by the Commerce Department with no burden of proof on one party or the other. In a civil action, however, recovery is permitted only when the case is proved by a preponderance of the evidence. This is an additional reason that such legislation would be violative of the international treaties providing for national treatment. So far as U.S. defendants were concerned, it would also raise constitutional questions of equal protection of the laws.

9. Compromises to create a cause of action under limited circumstances are undesirable and unnecessary.

It would not be difficult to design some provisions that would facilitate the recovery of damages under existing legislation, such as the Sherman Act or the Antidumping Act of 1916. This would be a major mistake. Any such move would subject imports to hazards that do not exist in the case of similar acts done domestically, which, as argued above, would be in violation of international obligations. Any attempt to move the law in the direction of making recovery of damages more easy or more likely would be exposed to all of the objections discussed above. There is no middle ground.

# # # # #

Metalworking
Fair Trade Coalition

C/O National Tooling & Machining Association (Secretariat)
9300 Livingston Road
Ft. Washington, MD 20744/301-248-6200

Testimony

of the

Metalworking Fair Trade Coalition

and the

Trade Reform Action Coalition

before

Senate Finance

Subcommittee on International Trade

July 18, 1986

Mr. Chairman and Committee members: My name is Carl Edquist. I am President of Carlson Tool and Manufacturing Corporation and First Vice Chairman of the Board of the National Tooling and Machining Association. Our association is one of nearly forty associations which are members of the Metalworking Fair Trade Coalition. These metalworking industries normally employ some two million workers in nearly 30,000 plants. The annual sales of the metalworking industry is $96 billion.

Like most of the associations in the Metalworking Fair Trade Coalition, NTMA represents companies which are mostly small. The average size of a company in our industry is twenty employees. Of the 3,500 companies in our association, probably not more than ten employ over 500.

The metalworking industry is seriously threatened by foreign competition. In several respects we are more threatened because small companies lack both jurisdictional access and financial resources to seek redress for unfair trade practices.

In the former case we are at a disadvantage because trade remedies for indirect foreign competition are limited. We may not see illegal subsidies, dumping, or other unfair practices which give our domestic customer's foreign competitors an unfair advantage. Yet those practices erode our domestic customer's market share, and as their supplier we suffer right along with them.

In the latter case, small companies are also in a dilemma with respect to direct foreign competition, which is increasing rapidly. To bring a trade case before the International Trade Commission can easily cost a quarter of a million dollars, more than the net worth of many small companies, and a good share of the net worth of most. For that reason small businessmen are disheartened because only the big companies have the resources to play in the high stakes remedy crafted thus far by Congress. They also lack the resources to set up offshore manufacturing facilities to cope with the problem.

Even if successful with an ITC case, those companies which can afford it will often find themselves in an extremely precarious financial situation as a result. Duties levied against offending foreign companies by the ITC and paid to the Federal government will do little to help the victorious petitioner. From an economic standpoint they might be better off to forswear prosecution and watch their company slowly dissolve.

For this reason we strongly support a private right of damages in addition to administrative remedies. The prospect of award of damages and court costs would mean that smaller manufacturers would at least have a chance to be made whole in the process of pursuing unfair trade remedies. Today they have no such chance.

We do not mean to suggest that we object to S.1860. It is a strong omnibus trade bill, provisions of which we strongly support. We believe that it can be made more effective by making it a vehicle that offers options to small companies and small associations which represent them. For that reason we suggest that the inclusion of a private right of damages provision in this legislation be considered most seriously.

Before smaller metalworking companies can even have access to administrative trade remedies, it is imperative that a diversionary dumping provision be added to the antidumping statute. Since 1984, U.S. petitioners have been permitted to complain that imported products contain subsidized components. However, the parallel provision on dumped components was deleted in conference even though both Houses adopted it during consideration of the Trade Act of 1984. Thus, there is at present no remedy against indirect, or diversionary dumping.

An example of diversionary dumping would be the result of a case where foreign steel is first found to be dumped into the U.S. market. While current sanctions that may be imposed hopefully eliminate the direct dumping of steel bar or plate, they do not address the likely conversion by our foreign competitors from dumped steel to dumped products made from that steel. Thus, a foreign steel producer, faced with restrictions on dumping directly into the U.S. market, may sell the steel to foreign competitors of our industry at the same dumped price. Those finished products come into the U.S. benefiting from the savings on the raw materials thus harming American tool, die, mold and precision machining companies. There is no statutory or administrative remedy for this pernicious form of indirect violation of the GATT Antidumping Code.

In closing we would like to suggest your consideration of the following additional areas of trade law reform, supported not only by members of the Metalworking Fair Trade Coalition but by the Trade Reform Action Coalition as well:

1. Clear statutory guidelines in regard to cumulation (the adding together of dumped and/or subsidized imports in the determination of injury);

2. A stronger U.S. commitments policy regarding foreign government promises to phase out and eliminate subsidies;

3. A more effective means of addressing critical circumstances (import surges) in the early stages of trade law cases;

4. More efficient procedures for disclosure of information crucial to parties in trade law proceedings; and

5. The closing of loopholes or correcting of oversights through provisions on definition of subsidy, penalty duty drawbacks (rebates), government payment of offsetting duties, injury findings on fungible products, and allowable adjustments for calculating dumping margins.

We believe that a comprehensive trade law reform package is necessary to bring fairness back to international trade. In this session of Congress the United States Senate has a unique opportunity to address all the major areas where improvements are needed. This Committee's excellent trade reform package, with the addition of the suggestions we have made today, will help accomplish that goal.

Thank you.

TRADE REFORM ACTION COALITION (TRAC)

Alliance of Metalworking Industries
Amalgamated Clothing and Textile Workers Union
American Apparel Manufacturers Association
American Brush Manufacturers Association
American Chain Association
American Cutlery Manufacturers Association
American Die Casting Institute
American Federation of Fisherman
American Fiber, Textile, Apparel Coalition
American Furniture Manufacturers Association
American Gear Manufacturers Association
American Institute of Steel Construction, Inc.
American Iron and Steel Institute
American Metal Stamping Association (Washer Division)
American Mushroom Institute
American Pipe Fittings Association
American Textile Machinery Association
American Textile Manufacturers Institute
American Wire Producers Association
American Yarn Spinners Association
Anti-Friction Bearing Manufacturers Association
Automotive Service Industry Association
Association of Die Shops International
Association of Synthetic Yarn Manufacturers
Bicycle Manufacturers Association of America, Inc.
Brass and Bronze Ingot Institute
Carpet and Rug Institute
Cast Iron Soil Pipe Institute
Cast Metals Federation
Clothing Manufacturers Association of America
Committee on Pipe and Tube Imports
Copper and Brass Fabricators Council, Inc.
Cutting Tool Manufacturers Association
Expanded Metal Manufacturers Association
Footwear Industries of America, Inc.
Forging Industry Association
Group of 33
Hand Tools Institute
Industrial Fasteners Institute
Industrial Perforators Association, Inc.
Industrial Union Department, AFL-CIO
International Ladies' Garment Workers' Union
International Leather Goods, Plastics and Novelty Workers Union
Investment Casting Institute
Iron Castings Society
Knitted Textile Association
Lead-Zinc Producers Committee
Luggage and Leather Goods Manufacturers of America, Inc.
Man-Made Fiber Producers Association, Inc.
Metal Cutting Tool Institute
Metal Treating Institute
Metalworking Fair Trade Coalition

National Association of Chain Manufacturers
National Association of Hosiery Manufacturers
National Association of Pattern Manufacturers
National Association of Uniform Manufacturers
National Cotton Council of America
National Foundry Association
National Knitwear Manufacturers Association
National Knitwear and Sportswear Association
National Screw Machine Products Association
National Tooling and Machining Association
National Wool Growers Association
Neckwear Association of America
Non-Ferrous Founders' Society
Northern Textile Association
Outdoor Power Equipment Institute
Plumbing Manufacturers Institute
Scale Manufacturers Association, Inc.
Steel Founders' Society
Steel Plate Fabricators Association, Inc.
Steel Service Center Institute
Synthetic Organic Chemical Manufacturers Association
Textile Distributors Association, Inc.
Tool and Die Institute
United Food and Commercial Workers International Union
U.S. Battery Trade Council
U.S. Fastener Manufacturing Group
Valve Manufacturers Association
Welded Steel Tube Institute
Work Glove Manufacturers Association

Biographical Sketch

Carl W. Edquist
Carlson Tool & Manufacturing Corporation
Cedarburg, Wisconsin

Carl W. Edquist is President of Carlson Tool & Manufacturing Corporation, Cedarburg, Wisconsin, a member of NTMA since 1964. Carlson, a medium sized tooling and machining company, has diversified operations, principally mold making, contract manufacturing and deep hole drilling and trepanning. Carlson observed its 25th anniversary in 1983.

Carl began his tool and die apprenticeship in 1936 and after attaining journeyman status worked as such in a number of industry companies in the Midwest and at Los Alamos Scientific Laboratory toward the end of World War II. In 1958 he organized Carlson.

Believing that membership in NTMA would have a profound positive effect on his or any tooling company, he has been active on most of the Association's committees over the years and served on the Blue Ribbon Training Committee. He was President of the Milwaukee Chapter in 1982 and continues to serve there as a Director. He was elected to the NTMA Executive Committee as Secretary-Treasurer in 1984.

Carl's other business interests include: President of Alcar Corporation, a Commissioner of the Cedarburg Municipal Light and Water Utility, Past President and Director of the local astronomy club, Vice President and Director of Ozaukee Bank, a director of an area stamping company and President of the Carlson Fine Arts Foundation.

His personal hobbies include sailing, photography, astronomy and gravestone rubbing. With his wife, Rita, they have eight grown children, two of whom are active in the Carlson enterprise.

* * * *

National Retail Merchants Association

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nrma

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STATEMENT OF THE
NATIONAL RETAIL MERCHANTS ASSOCIATION

IN OPPOSITION TO S. 1655, S. 2408,
AND SECTION 138 OF H.R. 4800:
LEGISLATION TO CREATE PRIVATE REMEDIES
FOR INJURY CAUSED BY "ILLEGAL" IMPORTS

SUBMITTED TO THE
SUBCOMMITTEE ON INTERNATIONAL TRADE
COMMITTEE ON FINANCE
UNITED STATES SENATE

July 18, 1986

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I. ANTIDUMPING PROVISIONS

A. Current Law and Policy Regarding Dumping

1. What is "dumping"?

"Dumping" is a term used in U.S. trade law and GATT solely to describe particular international transactions: those sales in which the price in a foreign market is less than the fair value price of the goods and in which an industry in that foreign market is injured or threatened with injury by reason of the sales at less than fair value.[2]

Despite the apparent simplicity of this definition, it is often very difficult to know whether particular transactions constitute dumping. On the pricing side, the comparison between the price in the international sale and the "fair value" price must take account of differences in the products sold, distribution systems, currency values, tax systems, and numerous other factors. The Commerce Department has developed expertise in analyzing these complex issues. On the injury side, the domestic industry is almost always affected by many more factors than merely the less than fair value ("LTFV") sales. Hence, deciding in advance whether LTFV sales will cause material injury to a U.S. industry is often little more than speculative.

The pejorative connotation often given to the term "dumping" obscures the fact that sales at different prices can have multiple procompetitive motivations and effects.[3] For example, differential pricing, which is often characterized as "dumping," frequently reflects business responses to changes in market or industry conditions.[4] Since the conditions in different markets are rarely uniform, companies that sell their products in different markets must have price flexibility to remain competitive in those markets.

2. Domestic competition policies

The international transaction concept of "dumping" does not have an analog in the laws governing domestic commerce. That is, a U.S. company may engage in domestic sales activity that would constitute "dumping" in the international

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2. 19 U.S.C. § 1673 et seq.; GATT, Art. VI; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as the Antidumping Code).

3. See J. Viner, Dumping: A Problem in International Trade, 23 (1923, reprinted 1980).

4. Indeed, Section 2 of the Clayton Act expressly recognizes that price discrimination may be "in response to changing conditions affecting the market for or the marketability of the goods concerned." 15 U.S.C. § 13(a).

context without running afoul of any law.[5] Indeed, "vigorous price competition is a central goal of the antitrust laws."[6] Only when pricing behavior is predatory, or "for the purpose of destroying competition," is it subject to sanction under the antitrust laws.[7]

Foreign companies that engage in such anticompetitive behavior in U.S. markets are subject to the basic U.S. antitrust laws in exactly the same way as U.S. sellers are. Foreign manufacturers or importers - but not U.S. sellers - are also subject to the 1916 Antidumping Act,[8] which, despite its common name, is actually an antitrust law with standards drawn from antitrust competition policy, not the somewhat different standards of the international trade antidumping law.[9]

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5. This fundamental point was, however, missed entirely in the Report of the Senate Judiciary Committee on S. 1655, when it stated "[f]oreign enterprises, like any domestic company, would be held responsible for the economic consequences of their anticompetitive actions." S. Rept. 99-295 at 7. (Emphasis added.) In fact, foreign companies would be required to pay damages under S. 1655 for actions that are not considered anticompetitive if engaged in by domestic companies.

6. O. Hommel v. Ferro Corp., 659 F.2d 340, 347 (3rd Cir. 1981).

7. See 15 U.S.C. § 13a; see also Barcelo, Antidumping Laws as Barriers to Trade - The United States and the International Antidumping Code, 58 Cornell L. Rev. 491, 499 (1972) (Barcelo defines "predatory dumping" as "practices which . . . cause such pervasive injury to domestic competition as to threaten monopolization.") In fact, below cost pricing is another complex and generally misunderstood issue. "Treatment of predatory pricing in the cases and the literature . . . has commonly suffered from . . . [a] failure to delineate clearly and correctly what practices should constitute the offense." P. Areeda and D. Turner, Antitrust Law - An Analysis of Antitrust Principles and Their Application, § 711a (1978).

8. 15 U.S.C. § 72.

9. 15 U.S.C. § 72; see also Zenith Radio Corp. v. Matsushita Electric Industrial Company, Ltd., 402 F. Supp. 251, 259 (E.D. PA 1975), aff'd, In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 319 (3rd Cir. 1983). ("While [the 1916 Act]. . .refers to the general practice of dumping, it in fact applies only to dumping that occurs 'continually and systematically.' And even that kind of dumping, which is marked by continuity and regularity, is not proscribed by the Act unless it is undertaken with a specific, predatory, anticompetitive intent.") (Emphasis added.)

3. Balancing policies

Combining the law imposing duties for dumping and the laws embodying U.S. competition policies thus results in a careful balance of somewhat different policies.[10] On the one hand, competition policy encourages price competition, and antitrust laws such as the Robinson-Patman Act and the 1916 Act punish only anticompetitive, predatory behavior. The standards and tests that must be met to obtain relief are intentionally and necessarily high, so as not to deter competitive pricing.

On the other hand, international agreements and U.S. trade law provide for imposition of duties for non-predatory price discrimination. The standards for imposition of these duties are far easier to meet than those of the domestic antitrust laws, and it is generally agreed that the dumping law imposes sanctions on some activities that are actually pro-competitive.

B. Upsetting the Balance and Violating U.S. Agreements--Proposals For Private Rights Of Action Against Dumping

Although S. 1655, S. 2408, and Section 138 of H.R. 4800 differ in certain respects, they are all equally unwise proposals because of their one key common characteristics--a private dumping remedy. The analysis that follows explains why that proposal is unwise and addresses the pertinent differences between the bills.

1. The anticompetitive costs of a private dumping remedy outweigh its de minimis benefits

10. The Report of the Ways and Means Committee on H.R. 4750, the forerunner to H.R. 4800, seeks to inject a third policy -- that of tort law. See H.R. Rpt. 99-581, Part 1 (May 6, 1986) at 105 (stating that a new private remedy for dumping is needed because the 1916 Act's standards are too high for a "commercial tort"). This notion is misplaced. As the American Law Institute has stated, "the law of Unfair Competition and Trade Regulation [which includes antitrust and dumping laws] is no more dependent upon Tort law than it is on many other general fields of the law and upon broad statutory developments, particularly at the federal level." Restatement (Second) of Torts, Intro. Note to Division Nine (1977). In any event, the early tort-based unfair competition concepts contained the same balance of policies that exists in today's federal trade regulation statutes. As the First Restatement puts it,

> The privilege to engage in business and to compete contemplates the probability of harm to the business or occupation of some persons who are subjected to the competition. . . . The theory is that, in the long run, competition promotes efficiency and economic general welfare and that to subject a person to liability merely for competing would result in preventing competition. Restatement of Torts. Comment d to § 708 (1938).

Enactment of these proposals will upset the current balance between competition policy and antidumping policy, resulting in serious anticompetitive effects.[11] Foreign manufacturers and importers will price their products artificially high to avoid risking exclusion of their products from the U.S. market or a judgment for damages extending back several years in time. This will inevitably produce economic inefficiency and higher prices for everyone.

Indeed, a domestic company could harass a foreign competitor merely with the threat of a lawsuit - regardless of its merits - even when that foreign competitor is trading its products fairly. A foreign producer, wary of costly litigation, might either abandon the U.S. market or agree with the domestic producer to what would amount to a cartel arrangement. Companies that defended the lawsuits will likely suffer disruption in their operations.

The losers would be American consumers and the economy generally as markets are divided, imports are disrupted, retailers are unable to plan their purchases in a cost-effective manner, and the costs of lawsuits are passed along to consumers in higher prices.

Given the anticompetitive costs of these proposals, any benefit that would be derived must be sufficiently significant to justify their enactment. But, in fact, the benefits of another dumping remedy are minimal at best.

First, the current administrative antidumping law provides timely relief. Dumping duties are imposed within 160 days of filing a petition, when the Commerce Department makes a preliminary determination of dumping.[12] A court suit would inevitably last far longer before any damage award would be made.

Second, prospective antidumping duties are a sufficient deterrence to dumping. "The mere initiation of a dumping procedure ... is often so costly to the importer that it, on the threat of such procedure, inhibits imports even if the procedure ultimately establishes that no dumping occurred."[13]

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11. For more detailed discussion of the serious anticompetitive effects of these proposals, see letters from John R. Bolton, Ass't. Attorney General, Office of Legislative and Intergovernmental Affairs, U.S. Dept. of Justice Committee, to Senator Strom Thurmond, Senator Judiciary Committee, February 4, 1986; Terry Calvani, Acting Chairman, Federal Trade Commission to Senator Strom Thurmond, Senate Judiciary Committee, October 18, 1985; James C. Miller III, Chairman, Federal Trade Commission to Senator Strom Thurmond, June 18, 1985, reprinted in S.Rpt. 99-295, supra note 5.

12. 19 U.S.C. § 1673(a).

13. See J. Jackson, World Trade and the Law of GATT, 704 (1969) (emphasis added).

Third, this new remedy is not necessary to deter predatory dumping practices, because these are already illegal under the antitrust laws.[14]

Finally, the idea of compensating U.S. industries for economic losses due to international competition must be approached cautiously. The availability of such a remedy would overwhelm the courts with suits, with lawyers and litigation consultants reaping the main benefits.

2. Establishment of private remedies for dumping conflicts with United States obligations under international agreements

The proposals for private remedy for compensatory damages are GATT-violative in several respects. First, to the extent that antidumping duties have already been levied on imports,[15] additional damages would invariably exceed the allowable level for duties. Second, and more important, retroactive damages would violate the Antidumping Code's express limits on such duties.

Third, the injunctive relief provided in S. 1655 is even more egregiously GATT-violative, since an injunction against imports could impose a zero quota, which contravenes GATT's Article XI, prohibiting quantitative restrictions.[16]

Moreover, a remedy for either damages or injunctive violates Article III of GATT, which requires imports to be accorded "national treatment," which is "treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their international sale."[17] A civil remedy for damages or injunctive relief that applies solely to activities involving imported articles seems to be a clear violation of this GATT provision.

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14. See discussion supra notes 7-9 and accompanying text. Moreover, as the Supreme Court observed recently, "predatory pricing schemes are rarely tried, and even more rarely successful." Matsushita Electric Indus. Co. v. Zenith, ___ U.S. ___, 54 U.S.L.W. 4319, 4323 (March 25, 1986).

15. Indeed, S. 2408 and H.R. 4800 make final affirmative antidumping determinations (and thus imposition of duties) prerequisites for relief. While this avoids the problem of a fragmented trade policy, it assures violations of GATT.

16. GATT provides a limited exception to this prohibition in Article XIX, the "escape clause." Since the requirements of the escape clause are far higher (in terms of the nature and causation of the injury suffered by a domestic industry), the prerequisites of the escape clause would not be met in a case where an injunction was issued under S. 1655.

17. GATT, Art III:4. This provision is to be read broadly, not narrowly, and is applicable to "any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the national market.'" J. Jackson, supra, at 288 (emphasis added).

Further, as the Department of Commerce has pointed out, several provisions of S. 1655 conflict with GATT and Antidumping Code requirements concerning findings of injury, Customs clearance procedures, and various procedural rights.[18]

There would be three very critical consequences if the U.S. were to enact these GATT-violative proposals. First, U.S. exporters would be exposed to internationally authorized retaliation from our trading partners in the form of increased tariffs or other import barriers. Second, our trading partners could pass "mirror" legislation, which "would mean wide-scale harassment of U.S. exporters in foreign courts."[19]

Finally, the Administration would find it extremely difficult to pursue key parts of our agenda for the new round of multilateral trade negotiations. In those negotiations, the U.S. would like to obtain agreement on enhanced dispute resolution measures and new rules in the areas of intellectual property and services. To the extent that the U.S. is seen to be flagrantly violating the existing rules through imposition of GATT-violative private remedies for dumping, there is a very strong likelihood that other GATT members would be unwilling to make the changes we are seeking. For the burgeoning U.S. services sector and for the key industries which depend on intellectual property protections, such a result would be a severe blow.

3. Adjudication of claims for damages would be time-consuming, cumbersome, and costly

Contrary to the stated intent of the advocates of these proposals, as the Justice Department has observed,

> "Complex issues of dumping margin, industry injury, and injury to the plaintiff are unlikely to be amenable to quick resolution in the federal courts. Pretrial procedures would usually encompass substantial discovery, including sensitive cost and marketing information."[20]

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18. See letter of Douglas A. Riggs, General Counsel, U.S. Department of Commerce, to Senator Strom Thurmond, Committee on the Judiciary, December 11, 1985 (reprinted in S. Rpt. 99-295, supra, at 28-30).

19. Cong. Rec. H 2968 (daily ed. May 20, 1986) (Remarks by Rep. Frenzel).

20. Letter from John R. Bolton, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, U.S. Department of Justice, to Senator Strom Thurmond, Judiciary Committee, (Feb. 4, 1986) (reprinted in S. Rpt. 99-295, supra, 13-20).

Even if the role of the court were confined to determining the amount of damages that should be awarded, as S. 2408 and H.R. 4800 provide, proof of damages would involve "complicated econometric analyses, the use of outside experts, and considerable cross-examination."[21]

Consider the following short list of questions that would surely arise in every case. Would damages be measured in terms of lost sales? If so, how should the court segregate sales lost because of dumping from sales lost for other reasons, such as the plaintiff's own inefficiency? Or should the court measure damages in terms of price suppression caused by dumping? How would the court determine what the "correct" price would have been in the absence of dumping?

Most important, what certainty can these advocates offer that the measures and standards which are used to resolve these issues will not encourage plaintiffs to seek compensation for economic losses unrelated to dumping? The answer is "None."

4. Imposition of damages on U.S. importers would be unfair

Both S. 1655 and Section 138 of H.R. 4800 would allow suits to be brought against the U.S. importers of goods at issue. As difficult as it is for foreign manufacturers to determine whether their pricing and marketing practices constitute "dumping," it is infinitely more difficult for American retailers to know whether the price they pay is at a "dumped" level. Further, retailers would undoubtedly receive letters from domestic suppliers, "notifying" them that foreign prices are at "dumped" levels. Retailers would then face an impossible choice, risking costly litigation and quadruple penalties if they continue to buy foreign products or accepting the price, value, and availability problems that led them to foreign suppliers in the first place. This situation would be grossly unfair to retailers and American consumers.

II. CUSTOMS PROVISIONS

S. 1655's second principal section allows certain types of domestic industries and firms to bring lawsuits to recover economic damages from an importer which has violated Section 592(a) of the Tariff Act of 1930[22] in a negligent or fraudulent manner. Courts would be authorized to grant equitable or monetary relief. There are several reasons why this proposal should be rejected:

1. Enactment of this proposal would frustrate the effective enforcement of the Customs laws

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21. Id.

22. 19 U.S.C. § 1592. This section of the customs laws prohibits importing or attempting to import merchandise into the United States by means of documents containing false material statements or material omissions and is administered by the United States Customs Service.

An essential element of Section 592 is its mitigation provision, which encourages importers to disclose violations voluntarily by authorizing mitigation of civil penalties when such disclosure occurs prior to the commencement of a formal investigation. Because such violations may nevertheless be found to constitute "negligence" on the part of the importer, enactment of this proposal would transform many voluntary disclosures into admissions of one of the two elements of prospective plaintiff's case -- and the only element within the control of the importer -- thereby creating a strong disincentive to such disclosures and frustrating the enforcement of the Customs laws.

2. Enforcement of U.S. Customs law and policy would be fragmented because plaintiffs could bring cases without a prior Customs determination of a violation.[23]

Because many Customs violations involve interpretation of highly technical rules, the capacity for multiple, contradictory rulings is enormous. This would also lead to wasting valuable court resources, as multiple judges grapple with the arcane body of Customs law.

3. These proposals would violate U.S. obligations under GATT and the Multifiber Arrangement.

Because these provisions would operate as restrictions on legitimate trade, they would violate Article XX of the GATT, even though they are purportedly related to Customs enforcement. One form of the trade disruption that is likely to result is the establishment of de facto - or voluntary private - quotas in textile trade beyond those existing and authorized on a government-to-government basis. Domestic manufacturers will have every incentive to use the threat of a customs suit to extract agreements from importers and foreign manufacturers to limit their imports of particular products from various countries. This kind of trade restraint will have obvious but very significant negative effects on retailers and our customers. American consumers will pay higher prices and have fewer product choices.

American exporters will suffer as well. American farmers in particular have suffered, and continue to suffer from the effects of trade retaliation resulting from U.S. Government unilateral actions to restrict textile imports, especially from the People's Republic of China. Similar retaliation would be inevitable if private, de facto quota agreements deny our trading partners the benefits they are entitled to under the MFA and the GATT.

4. S. 1655 Is Unnecessarily Harsh Legislation

Forcing importers to litigate cases and pay damages for merely negligent violations is an extreme proposal. Given the tremendous complexity of various customs regulations, and the enormous amount of paperwork involved, it is not

23. See 50 Cong. Rec. S. 11647 ("This bill will greatly increase the enforcement of [the Customs] laws, by letting injured American businesses go directly to Federal court . . . and seek quick injunctions against continued illegal importation.")

uncommon for importers to make "negligent" mistakes. Such mistakes do not, however, represent a serious problem requiring a new remedy. The existing Customs enforcement system is fully adequate and appropriate for merely negligent violations.

The bill's provision for injunctive relief is especially harsh and unnecessary. An injunction is an extraordinary remedy which courts are generally reluctant to grant unless monetary damages are insufficient.[24] It is a remedy grounded in equity requiring careful consideration of a variety of competing factors. Under S. 1655, however, a plaintiff can obtain a ban on imports merely by showing that an importer negligently violated a technical, complex customs regulation.

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24. See e.g., Wisconsin Gas Co. v. FERC, 758 F.2d 669 (CADC 1985) ("The basis for injunctive relief is irreparable harm and inadequacy of legal remedies."); Everson v. Ortego, 605 F. Supp. 1115 (DC AZ, 1985) ("An injunction is an extraordinary remedy and is never lightly dispensed by a federal court.")

STATEMENT OF
CHARLENE BARSHEFSKY
BEFORE THE
SUBCOMMITTEE ON
INTERNATIONAL TRADE
OF THE
COMMITTEE ON FINANCE
UNITED STATES SENATE

HEARING ON S.1655,

"The Unfair Foreign Competition Act of 1985"

August 1, 1986

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STATEMENT OF CHARLENE BARSHEFSKY

My name is Charlene Barshefsky. I am a partner at the Washington, D.C. law firm of Steptoe & Johnson. This statement, however, is submitted on my own behalf, rather than in representation of the interests of any client or the law firm itself. The issue before the Subcommittee in this hearing -- whether a private right of action should be provided for parties injured by dumping violations -- is one with which I am quite familiar. In April of this year I was asked to address this very topic before the annual Judicial Conference of the Court of Appeals for the Federal Circuit.

My position is that S. 1655, which would amend the Antidumping Act of 1916, 15 U.S.C. 72, to create a private damage remedy for dumping, is an unwise legislative proposal. This Statement reviews some of the general problems inherent in an attempt to convert the 1916 Act into a private right of action for dumping. It then reviews some of the problems specifically raised by the provisions of S. 1655. A number of the problems discussed below have previously been highlighted in the testimony of agencies such as the Department of Justice and various private practitioners. The Statement concludes that the Department of Commerce can take various administrative actions in handling antidumping proceedings that would alleviate in large part the concerns underlying the proposed legislation.

A. The 1916 Antidumping Act

Despite its name, the 1916 Antidumping Act is an antitrust law, codified with the other antitrust laws at 15 U.S.C. 72. It condemns a dumping-like activity, namely the sale within the United States of goods at prices lower than those at which the goods are sold in the country of production or third-country markets. The Act's language, however, reveals its antitrust background and is very different from the language of the antidumping provisions in the Trade Agreements Act of 1979. For example, the 1916 Act imposes stringent requirements of proof -- the dumping must be "common and systematic," and the dumped price in the United States must be "substantially" less than the foreign price of the goods. In addition, a petitioner under the 1916 Act must show that the alleged dumper had the specific intent to destroy or injure a U.S. industry or to prevent the establishment of a U.S. industry or to restrain or monopolize trade in the United States. Moreover, like the other antitrust laws, the 1916 Act creates both criminal and civil penalties for the prohibited activities, which are punishable by a $5000 fine or one year

imprisonment, and for which treble damages may be recovered by injured private parties.

The history of the 1916 Act also reveals its antitrust background. It was enacted to close a loophole in the antitrust laws as they stood at that time: while "unfair competition" in the form of price discrimination in domestic trade was prohibited by section 2 of the Clayton Act, such "unfair competition" could still take place if its origins were "abroad." But because of its grounding in antitrust, the 1916 Act carries the characteristics of all antitrust laws -- namely, that it is intended to foster competition, not merely protect individual competitors, and thus that it does not automatically condemn all price discrimination but only those activities found to be predatory. In various circumstances price discrimination may be competitively neutral or even procompetitive, and the 1916 Act was not intended to outlaw such activities.

S. 1655 would dissociate the 1916 Act from its antitrust foundations and nullify the careful distinction between predatory and competitively neutral dumping. It would expand the Act's scope to apply to all situations that may technically be considered dumping, as defined by the administrative trade laws. I would like to describe what the bill would propose to do and the problems that would arise from changing the 1916 Act from an international antitrust to an international trade law.

B. The Proposed Amendments to the 1916 Act

In each of the past four Congresses, legislation has been introduced proposing amendments to the 1916 Act. The direction of the bills over the years has been gradually to eliminate the antitrust characteristics of the 1916 Act, leaving it increasingly as a law providing simply for private damages for parties injured by dumping. In so doing, S. 1655 provides the following:

- It would redefine the wrongdoing in the 1916 Act in language modeled on the antidumping provisions of the Trade Agreements Act.

- It would provide a private right of action for U.S. parties injured by such dumping, where material injury was caused or threatened.

- It would eliminate the criminal penalties and treble damage remedies presently provided in the 1916 Act.

- It would provide that a domestic industry's prima facie case would be made out through the final determination of either the International Trade Commission or the Department of Commerce in parallel administrative antidumping proceedings.

- It would authorize injunctions banning the continued import of the product under investigation (or other sanctions) in response to discovery violations by the foreign defendant.

- It would require the inclusion, in the foreign market value or constructed value of the product (against which the U.S. price is compared), of the amount of any government subsidy provided to the foreign manufacturer or exporter.

In addition to these provisions, S. 1655 also incorporates one major change that deviates from other similar proposals. It reverses the remedial priorities by making an injunction against further imports the primary mode of relief, and allowing damages only to the extent an injunction is considered inadequate. Thus S. 1655 no longer satisfies one of the major rationales for amending the 1916 Act in the first place, which was to fill the gap left open by the lack of retrospective relief for dumping in the trade laws.

C. General Problems with the Amendments of the 1916 Act

Numerous general problems attend any proposal to convert the 1916 Act into a trade law, as is clear from a review of S. 1655.

1. Some of the basic problems with S. 1655 arise from the fact that, although it would convert the 1916 Act into a trade law, the 1916 Act would still remain, outwardly at least, an antitrust law codified with the other antitrust provisions. The policies underlying the antitrust and trade laws are, to some extent, inconsistent. On the one hand, the antitrust laws are intended to preserve competition, not to protect individual competitors. The dumping law, on the other hand, is intended to protect individual industries from certain

forms of low-priced foreign competition. Where dumping is found, there is no consideration of its competitive market effects or whether the benefit to consumers of the lower prices outweighs the harm to the injured industry.

The provisions of the 1916 Act fit well within the antitrust scheme by requiring, in effect, that the challenged dumping have an anticompetitive effect and purpose before a violation may be found. Because occasional, nonpredatory dumping has no anticompetitive effects, it is outside the scope of the 1916 Act. Under the present proposal, however, damage liability would arise from any dumping activity, even if done with neither predatory intent nor anticompetitive effect. Thus, S. 1655 would totally recast the 1916 Act and give it an entirely new purpose -- a purpose inconsistent with the antitrust laws of which the 1916 Act is meant to be a part.

2. The proposed amendment of the antitrust laws causes a problem with the General Agreement on Tariffs and Trade (GATT) as well. Article III.2 of the GATT requires that signatories treat the products of other signatories "no less favorabl[y]" than like products of national origin. The 1916 Act presently satisfies this GATT obligation because it subjects foreign companies to rules governing price discrimination closely similar to those applicable to U.S. firms under the antitrust laws.

S. 1655, however, would amend the antitrust laws vastly to expand the potential liability and to apply new and complex rules only for foreign competitors. Indeed, the bill's very intent is to define as unfair foreign conduct that would not be treated as unfair competition under the U.S. antitrust laws. Not only is this contrary to the position taken by the United States in the past in response to such discrimination by other nations, but it would also violate Article III of the GATT.

3. Even if considered a trade law rather than an antitrust law, the proposed amendment to the 1916 Act may well be incompatible with the GATT. Article 11 of the GATT Antidumping Code provides that remedies for dumping will not apply retroactively, except for a ninety-day retroactivity allowed in certain circumstances. In addition, both the GATT and the Code provide that duties are to be the exclusive remedy: Article VI.7 of the GATT notes that "[n]o measures other than antidumping . . . duties shall be applied . . . for the purpose of offsetting dumping . . .," and Article 16(1) of the Code states that "[n]o specific action against dumping of exports . . . can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement." S. 1655 violates these limitations. It would expand the retroactive application of the antidumping law and would create entirely

new remedies -- private damages and injunctive relief -- in addition to the duties provided for in the GATT.

4. It has been argued that, even if inconsistent with the GATT, the 1916 Act is subject to the GATT's "grandfather clause," which exempts preexisting legislation from the GATT's restrictions. It has also been argued that S. 1655 changes the 1916 Act in ways that make it, if anything, more consistent with the trade legislation enacted pursuant to the GATT, so that it, too, must be GATT-legal.

There are serious problems with this line of reasoning. First, the proposed changes are to an antitrust law, and would expand its scope broadly to govern predominantly trade matters. As such, S. 1655 appears to be new legislation, not covered by the grandfather clause. In addition, these changes would substantially increase the scope of liability for foreign parties and substantially reduce the burden of proof borne by domestic petitioners. It would be difficult to argue that these changes fall within the grandfathered protection of the 1916 Act.

5. Even if the proposal does not technically violate the GATT, it would be perceived by our trading partners as an unfair and unilateral expansion by the United States of its trade laws. As a result, enactment of S. 1655 could well lead to retaliation against our own exports, or the adoption of mirror legislation aimed at the pricing practices of U.S. exporting firms. The consequences could be a reduction of U.S. exports and injury to U.S. industries that outweigh any benefits of expanding the 1916 Act.

6. In addition to questions about its consistency with the GATT, the proposal also will cause great difficulties for foreign parties seeking to comply with it. Under the antidumping law, the determination whether dumping has occurred is very complicated. In many situations, it is extremely difficult for a foreign manufacturer to calculate in advance with any precision the "fair value" of his product so that he may know whether he is dumping. Moreover, dumping margins can be radically affected by currency fluctuations over which the foreign producer has no control.

Foreign producers may respond to the potential liability they would face from the expanded 1916 Act by deciding not to compete in the United States, or by inflating their U.S. sales prices. S. 1655 thus would reduce significantly the positive impact of low but competitively-priced imports on domestic U.S. markets. This is especially unfortunate given that some of the pricing practices that the proposal seeks to prevent are, in fact, often procompetitive in effect and therefore may be exempted from antitrust liability under domestic U.S. law.

7. Yet another problem with the proposal arises from its authorization of the use of "constructed value" in cases where there are no home market sales or third country sales from which "foreign market value" may be calculated. The "constructed value" approach is particularly complex and not amenable to advance estimate by a foreign producer attempting to determine a safe pricing range in exporting to the United States.

Moreover, in constructed value cases, markups of ten percent for overhead and eight percent for profit are automatically included. It seems especially inappropriate to find damage liability for an alleged violation in cases where the defendant is simply taking advantage of efficiencies that reduce its overhead, or where the defendant makes a profit, merely because that profit is not large enough.

8. One of the major arguments in support of S. 1655 is that it would expedite resolution of and reduce the cost of litigating dumping cases. Enactment of this legislation, however, may well have the opposite result. Unlike the provisions of the Trade Agreements Act, the Federal Rules of Civil Procedure, which would govern the litigation of claims authorized by this bill, do not contain strict time limits for resolution of civil proceedings. Also, the liberal discovery provisions of the Federal Rules would permit the parties to engage in extensive discovery. In addition, proof of damages, which is not part of the current antidumping procedure, would involve complicated and time-consuming analyses. It is therefore doubtful that a private dumping action would provide more expeditious relief to domestic industries than do existing procedures.

Some supporters of the bill have suggested that it can offer fast relief through TRO's, preliminary injunctions, or import exclusion orders. Such orders, however, presumably would be issued only after the courts have applied accepted standards for preliminary relief; that is, they would grant relief only on a showing of a likelihood of success on the merits and a likelihood of irreparable harm. But these showings require factual findings and a weighing of the conflicting harms that may be felt by the parties. These requirements make it highly doubtful that even preliminary judicial determinations would be made as quickly or efficiently as determinations under existing antidumping procedures.

9. Other problems with the proposal arise from the uneasy relationship between the federal courts and the agencies functioning under the Trade Agreements Act. One major problem arises from the provision in S. 1655 that would give prima facie effect to final determinations by the ITC or the Commerce Department. This problem is due to the non-adversarial nature of the agencies' proceedings. Although interested parties are

provided some participatory rights, they do not have the full range of rights available in judicial proceedings, such as discovery and cross-examination. As a result, agency determinations in which a party had less than complete rights of participation could, under S. 1655, have a prima facie effect on that party in a 1916 Act case.

A final problem is that S. 1655 would disperse the judicial responsibility for developing antidumping law. Under the Trade Agreements Act, judicial review of agency decisions is exclusively in the hands of the Court of International Trade and the Court of Appeals for the Federal Circuit. The bill, however, would give jurisdiction to review one particular set of antidumping-type claims to the federal district courts. The inevitable result will be a divergence among the courts in decisions in the antidumping area, with conflicts among circuits and between those courts and the specialized trade courts. The Congressional purpose in creating specialized courts will be undermined in this important area of trade law.

D. Specific Problems with S. 1655

In addition to the general objections, several problems arise from the specific provisions of S. 1655.

1. S. 1655 differs from other proposals to create a private right of action in one significant respect: it has reversed the priority of remedies. The other bills would provide a prevailing domestic party damages from the foreign exporter, and injunctive relief would be granted only to the extent necessary. Under S. 1655, however, the prevailing party would obtain an injunction, and damages would be awarded only if equitable relief is found to be inadequate. This reversal totally undermines one of the basic purposes of the legislation, which has been to fill the perceived need for retrospective relief for dumping injury. Prospective injunctive remedies cannot assist in bringing such relief to injured parties. In addition, prospective relief in the form of duties is already adequately provided through the present antidumping law. The change of remedies renders the bill purposeless.

2. This shift of remedial emphasis further jeopardizes the bill's GATT legality. Indeed, it undermines one of the primary arguments presented by its proponents in favor of GATT-compatability -- that whether or not inconsistent with the GATT, the 1916 Act and the proposed amendments are grandfathered. This argument is based on the fact that the 1916 Act already provided a damage remedy for private litigants which predated both the GATT and the Antidumping Code. It is very clear, however, that by changing the primary remedy from damages to injunctive relief, S. 1655 would so significantly

alter the thrust of the 1916 Act as to be considered a new measure that does not pre-date the GATT or the Code.

3. These arguments against the imposition of injunctive relief apply as well to the provisions of S. 1655 authorizing a court to impose an import ban in response to discovery violations. Not only is such a sanction overly draconian, but it also violates the GATT limitations on restrictions that signatories may impose on imports from other nations. A ban on imports is not permitted even if dumping is shown. It would be even more inappropriate to impose an import ban in response to mere discovery violations.

4. Another major difficulty arises from the provision in S. 1655 authorizing the inclusion of the amount of government subsidies provided to a foreign exporter in calculating the foreign market value of the exported product. This provision broadly expands the 1916 Act and the proposed amendment far beyond its intended scope, which is to provide a remedy for a private party injured by the unfair acts of another private party. Where subsidies are alleged, the party causing the injury is a foreign government. Extension of litigation into questions of subsidies would constitute a clear intrusion into a sensitive aspect of government relations. In addition, there is no credible argument that a new remedy against subsidies would be consistent with U.S. GATT obligations. The "grandfathering" argument applying to the 1916 Antidumping Act clearly does not extend to subsidies.

E. An Alternative Approach

To the extent that foreign dumping practices require a more rigorous response under U.S. trade laws than presently provided, there are methods of strengthening the law that would be less GATT-violative than the proposal to amend the antitrust laws. The most straightforward approach would be to amend the Antidumping Code to expand the 90-day period of retroactive application. But this, of course, is a long-term solution because of the length of time necessary to amend a GATT Code.

In the shorter-run, the present retroactivity provisions can be strengthened simply through amendment of Commerce's regulations implementing them. This would be fully GATT-compatible because Article 6(9) of the Code explicitly notes that it is "not intended to prevent the authorities of a Party from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final findings . . ., or from applying provisional or final measures. . . ."

For example, retroactivity is a concern primarily when certain types of dumping -- "inventory" and "hit-and-run"

dumping -- are involved. To expedite the early stages of an investigation, Commerce could easily relax the requirements in its regulations for filing a petition in cases where it appears that those types of dumping are involved. That could save a petitioner some two to four months in the preparation of his case. In addition, Commerce could reduce the amount of time in which a preliminary determination may be made (and the importer's contingent liability for duties to commence) in such cases from five months to ninety days, adding the two remaining months on to the final determination stage so as to permit a thorough investigation. In this way, the present retroactivity provisions would reach back to the date of the filing of the petition, which itself would be prepared far more expeditiously than under current practice. The result would be meaningful relief to the industry some four to six months earlier than presently available.

While this solution may not be perfect, it is far preferable to amending the 1916 Act in the manner suggested by S. 1655. It makes much more sense to amend the present GATT-compatible administrative regime (and, through the Code, amend the 90-day period altogether) before making such major and troublesome changes as those proposed in the Senate bill.